(1) Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

UNITED AIR LINES, INC., a Delaware corporation, and
AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER,
a home rule City and a Colorado municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Colorado Supreme Court's modification of the Denver use tax statute in an effort to preserve the constitutionality of the statute against a Commerce Clause challenge renders the statute unconstitutionally vague in violation of the Due Process Clause.

PARTIES TO THE PROCEEDINGS

Petitioner United Air Lines, Inc., is a subsidiary of UAL Corporation, a publicly owned corporation. Petitioner Air Wisconsin, Inc., is a wholly-owned subsidiary of Air Wis Services, Inc., a wholly-owned subsidiary of UAL Corporation.

Respondent is the City and County of Denver, a home rule city and a Colorado municipal corporation.

RULE 29.1 LISTING

Petitioner United Air Lines, Inc., is a subsidiary of UAL Corporation, a publicly owned corporation. Petitioner Air Wisconsin, Inc., is a wholly-owned subsidiary of Air Wis Services, Inc., a wholly-owned subsidiary of UAL Corporation. United Air Lines, Inc., owns, either directly or indirectly, a 10% or more interest in the following entities: AirLiance Materials, LLC; Atlanta Airlines Terminal Corporation; CIMO, Inc.; DUNC, LLC; Galileo International, Inc.; GetThere.com; Reno Fueling Facilities Corp.; and Skytech Solutions, LLC.

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OPINIONS BELOW

The opinion and order of the Supreme Court of Colorado (App. 1a-3a and App. 1b-3b) are not reported. The opinion of the Court of Appeals of Colorado is reported at 973 P.2d 647 (Colo. Ct. App. 1998) (App. 1d-26d). The order of the District Court for the City and County of Denver (App. 1e-7e) is not reported. The final decision and order of the hearing officer for the Manager of Revenue of the City and County of Denver (App. 1f-17f) is not reported.

JURISDICTION

The judgment below was entered on January 24, 2000. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. art. I, § 8 provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."

U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Denver Revised Municipal Code (D.R.M.C.), particularly §§ 53-92 and 53-97, are set forth in the Appendix at 1g-12g.

STATEMENT

Denver's Use Tax Statute

Denver has adopted a sales and use tax statute, codified at D.R.M.C. §§ 53-21 *et seq.* The sales tax is imposed on the purchase price paid or charged upon taxable goods and services purchased at retail within Denver. D.R.M.C. § 53-25. The use tax is imposed on "the taxable privilege of storing, using, distributing or consuming" in Denver taxable goods and services purchased elsewhere. D.R.M.C. § 53-96 (App. 5g-7g). These taxes are levied in addition to any applicable State of Colorado sales and use taxes. COLO. REV. STAT. §§ 39-26-101 *et seq.*

When taxable goods or services are purchased or used outside Denver and are therefore subject to sales or use tax prior to entering the city, the Denver use tax still applies. In such a case, however, D.R.M.C. § 53-92(c) provides a credit for sales or use taxes paid to other municipal governments:

> It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provisions of this article shall apply to any person who has already paid a retail sales tax or a use tax in respect to the sale of a service or tangible personal property taxable hereunder, *to a municipal corporation* organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distrib-

> uted or consumed in the city, but the tax imposed by this article shall, in such event, be measured by the difference between the amount imposed by this article and the amount previously imposed *by the other municipality* on said sale. If the retail sales tax imposed and paid *to such municipal corporation* aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege of using, storing, distributing or consuming such service or personal property in the city. (emphasis added; App. 4g-5g).

Thus, D.R.M.C. § 53-92(c) allows a credit for sales and use taxes paid *to other municipalities*. It does not, however, according to its plain language and the expressed legislative intent of the Denver City Council, allow a credit for sales and use taxes paid to other states or to their nonmunicipal local jurisdictions, and no other statutory provision in the sales and use tax ordinance provides for or addresses the availability of such a credit.

Denver's use tax statute exempts from taxation certain sales, including:

> All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state. (D.R.M.C. § 53-97(11); App. 9g).

For the administration of the sales and use tax, Denver has promulgated a form, the Denver Sales/Use Tax Return,

to be filed by taxpayers. This form provides a section for exemptions and a separate section for credits.

The Airlines' Operations

United Air Lines, Inc., and Air Wisconsin, Inc., (collectively referred to as the "Airlines" in this Petition) are interstate airline carriers of passengers and cargo. In the course of their operations, the Airlines purchased various rotable aircraft parts and engines, *i.e.*, those capable of repeated installation, removal, maintenance and repair, and reinstallation. These rotable parts and engines were purchased outside Denver, were typically stored, maintained, and repaired outside Denver, and were used outside Denver for a considerable portion of their useful lives, which can total up to 20 years. The rotable parts and engines were shipped into Denver during the course of their useful lives to be installed on the Airlines' aircraft. Many of the rotable parts installed in Denver had been subjected to state and local sales or use taxes in other jurisdictions before their installation in Denver.

The Proceedings Below

Beginning with the hearing before the hearing officer for the Denver Manager of Revenue, the Airlines challenged the constitutionality of the Denver use tax statute because the partial credit scheme provided in D.R.M.C. § 53-92(c) limits the credit to taxes paid to other municipalities and does not provide a full credit for all state and local taxes previously paid in other states, as required by the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8. *See, e.g., Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993). Denver's initial position in this proceeding was that its partial credit scheme is sufficient to satisfy the Commerce Clause

because, as a municipality, it need only provide a credit for taxes paid to other municipalities and may leave the State of Colorado or its nonmunicipal local jurisdictions to grant a credit for taxes paid to other states or their nonmunicipal local jurisdictions. Denver's Brief Before the Manager of Revenue, at 3-4. Denver, nevertheless, allowed a credit to the Airlines for nonmunicipal taxes, but insisted it was not required to do so. *Id.* at 3.

The hearing officer agreed with Denver and upheld the application of the Denver use tax as written, finding that the partial credit scheme satisfied the Commerce Clause. Decision of the Manager of Revenue, at 6-7 (Apr. 18, 1996) (App. 9f-11f). The Airlines appealed the hearing officer's decision to the District Court for the City and County of Denver. The Airlines argued the full credit is a constitutional requirement and D.R.M.C. § 53-97(11) provides no basis for allowing the full credit. Airlines' Opening Brief to the District Court, at 20-25, 33-34. The Airlines asserted that, Denver's continuing insistence that it was not required to allow a credit for nonmunicipal taxes provided no reasonable assurance the Commerce Clause violation would not recur. *Id.* at 37. The district court concluded that the failure of the statute to grant more than a partial credit would cause it to violate the Commerce Clause, but that the exemption in D.R.M.C. § 53-97(11) provides a basis for granting the full credit required by the Commerce Clause. District Court Opinion, at 3-4 (Dec. 12, 1996) (App. 6e). Therefore, the district court upheld the imposition of the use tax on the Airlines' rotable parts and engines.

Upon appeal to the Court of Appeals of Colorado, the Airlines continued to argue that the statute violates the Commerce Clause. Airlines' Opening Brief to the Court of

Appeals, at 14-16. The Airlines also argued that, given the absence of statutory support for the application of the full credit and the clear legislative intent to provide a partial credit scheme, the Denver use tax cannot be construed in a manner that is constitutional and therefore it should be invalidated. *Id.* at 16-24. The Airlines also stressed the particular need for clear guidelines in a self-assessment system of taxation, and the statute's failure to provide those guidelines. *Id.* at 25. Denver continued to assert that it was not required to provide the full credit and that its partial credit scheme did not violate the Commerce Clause. Denver's Answer Brief to the Court of Appeals, at 5-13. The court of appeals affirmed the district court's decision. *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647 (Colo. Ct. App. 1998) (App. 1d-26d).

The Supreme Court of Colorado granted the Airlines' petition for a writ of certiorari. Before that court, Denver abandoned its prior defense of the partial credit scheme and asserted instead that D.R.M.C. § 53-92(c) does not limit the credit to municipal taxes. In support of its position, Denver contended the term "municipality" as used in that provision in fact includes nonmunicipalities and that the failure of the provision to grant a credit for taxes paid to other states is merely due "to an inadvertent omission . . . or poor drafting." Denver's Answer Brief to the Colorado Supreme Court, at 13-16. Denver also embraced the holding of the court of appeals that any failure in the statute can be remedied by D.R.M.C. § 53-97(11). *Id.* at 18. The Airlines argued that interpreting D.R.M.C. § 53-97(11) to provide the full credit would do violence to the statutory language and the legislative intent. Airlines' Opening Brief to the Colorado Supreme Court, at 17-22, 25-26. They argued that Denver's conflicting positions on the issue, both throughout the course

of this case and between this case and the *General Motors* case (described below), result in confusion to taxpayers, severely undermining the principles of self-assessment and voluntary compliance that are fundamental to the use tax system. *Id.* at 22-25; Airlines' Reply Brief to the Colorado Supreme Court, at 5, 11-13.

On December 6, 1999, the Colorado Supreme Court issued an order denying certiorari "as having been improvidently granted." Colorado Supreme Court Order, at 1 (Dec. 6, 1999) (App. 1b). The same day, the court issued its opinion in *General Motors Corporation v. City and County of Denver*, 990 P.2d 59 (Colo. 1999) (App.1c-37c), in which it held that the exemption under D.R.M.C. § 53-97(11) permits the full credit required by the Commerce Clause, thus preserving the constitutionality of the Denver use tax.[1/] In a subsequent opinion, dated January 24, 2000, the Colorado Supreme Court withdrew its December 6, 1999, order in this case, reinstated the writ of certiorari, affirmed the court of appeals' judgment, and stated that it viewed its decision in *General Motors* "as fully and completely addressing the issue on which we granted certiorari in this case." Colorado Supreme Court Opinion, at 2 (Jan. 24, 2000) (App. 2a).

In *General Motors,* the taxpayer also challenged the constitutionality of the Denver use tax statute on various grounds. Among the issues presented in *General Motors* was whether Denver was required by the Commerce Clause to grant the full credit. Contrary to the position it took in this case before the Colorado Supreme Court, Denver took the

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[1/] The Colorado Supreme Court referred to the Airlines' case in a footnote in the *General Motors* opinion. 990 P.2d at 70, n.10 (App. 18c).

position in that case, before the same court, that it was not required to grant the full credit. *See* 990 P.2d at 69 (App. 16c). The Colorado Supreme Court disagreed and found that Denver's credit mechanism could cause multiple taxation and thus, viewed by itself, the credit provision in D.R.M.C. § 53-92(c) creates a crediting scheme that violates the Commerce Clause. *Id.* (App. 17c) The Colorado Supreme Court held, however, that "D.R.M.C. § 53-97(11) operates to save [the crediting scheme] from such a constitutional failure," and concluded that the exemption provision permitted the allowance of the full credit required under the Commerce Clause. 990 P.2d at 70 (App. 19c).

While interpreting the exemption provided in D.R.M.C. § 53-97(11) as protecting the credit rules of D.R.M.C. § 53-92(c) from a constitutional challenge based on the Commerce Clause, the Colorado Supreme Court acknowledged that its action could be creating a different constitutional problem.

> Our conclusion leaves open the question of whether the Code fails to alert taxpayers of the proper credit available to them. It could be subject to a due process challenge because a law is void for vagueness when a person of ordinary intelligence cannot reasonably determine what a statute requires or forbids. This requirement allows people to conduct themselves in accordance with law, and prevents arbitrary and discriminatory application of the law. (990 P.2d at 70, n.11; citations omitted; App. 19c)

It is precisely that question that caused the Airlines to challenge the lower courts' reliance upon D.R.M.C. § 53-97(11) to cure the Commerce Clause defect of the Denver use tax statute and that the Airlines raise in this Petition.

REASONS FOR GRANTING THE PETITION

I. THE COLORADO SUPREME COURT'S ACTION VIOLATES THIS COURT'S MANDATES BY CAUSING THE DENVER USE TAX LAWS TO FAIL TO ESTABLISH MINIMAL GUIDELINES FOR ADMINISTRATION AND TO FAIL TO GIVE ADEQUATE NOTICE TO TAXPAYERS.

A. This Court has consistently required that all legislation meet basic guarantees of due process by providing those charged with the law's implementation with appropriate guidelines to guard against arbitrary enforcement and by providing citizens with adequate notice of what the law requires or forbids.

From the earliest days of the republic, this Court has required that laws be certain and intelligible to those who are expected to comply with them and to those who are expected to enforce them. *E.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). More recently, this Court has construed the Due Process Clause of the United States Constitution, U.S. CONST. amend. XIV, § 1, as embodying a vagueness doctrine that requires all legislation to: (i) provide citizens proper notice of prohibited or required conduct; and (ii) provide minimum guidelines for enforce-

ment, thus preventing the possibility of arbitrary and discriminatory enforcement. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

It is well settled that the vagueness doctrine applies to all legislation, civil statutes as well as criminal statutes. *See, e.g., Gentile*, 501 U.S. 1030; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Boutilier v. INS*, 387 U.S. 118 (1967), including civil tax statutes. *See, e.g., Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990). *See also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).[2/]

The Colorado Supreme Court's cure for the unconstitutionality of the Denver use tax regime was to substitute a void for vagueness defect for the Commerce Clause defect. As written, the use tax scheme is clear in its scope and operation; its constitutional infirmity is that it violates the Commerce Clause. As interpreted by the Colorado Supreme Court, the use tax scheme no longer offends the Commerce Clause but the mechanism by which this is achieved, a stunningly agile reading of D.R.M.C. §§ 53-92(c) and 53-97(11), surely violates due process guarantees.

[2/] *See also Colorado Auto Auction Services Corp. v. City of Commerce City*, 800 P.2d 998 (Colo. 1990) (excise tax); *State v. Golia*, 222 S.E.2d 27 (Ga. 1976) (beer tax); *Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979) (tax on mineral interests); *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100 (Mo. 1997), *cert. denied* 524 U.S. 916 (1998) (income tax); *Foss v. City of Rochester*, 480 N.E.2d 717 (N.Y. 1985) (property tax).

B. The Colorado Supreme Court's action creates a statute that fails to provide minimum guidelines for enforcement and administration of the Denver use tax laws.

Of the two alternative grounds for invalidating a vague statute, the more important consideration here is that the statute as construed by the Colorado Supreme Court fails to provide minimum guidelines for implementation and invites arbitrary enforcement, which violates the Due Process Clause. *See Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

The Colorado Supreme Court's interpretation of Denver's use tax statute provides no guidelines as to how it is to be executed and enforced and leaves no indication of how D.R.M.C. §§ 53-92(c) and 53-97(11) are to function in concert, engendering and inviting the type of inconsistent and arbitrary behavior exhibited by Denver in this case. For example, while asserting before the Colorado Supreme Court in this case that it *was* required to grant the full credit under its use tax law, Denver asserted before the same court and at the same time in *General Motors* that it *was not* required to grant the full credit, arguing that the ordinance provided only for a partial credit and the partial credit satisfied the Commerce Clause. Thus, Denver took contradictory positions on the same issue not only at different levels of proceeding in one case, but in two different taxpayers' cases simultaneously pending before the same court, apparently depending on what it viewed as expedient in each case and at each level of proceeding.

The Colorado Supreme Court recognized, but did not reach, the question of whether its interpretation of the Denver use tax statute violates the Due Process Clause, but it as-

sumed no such issue would arise if "Denver grants the credits demanded by the Constitution to any use taxpayer." 990 P.2d at 71, n.11 (App. 19c). In light of Denver's history of contradictory self-serving interpretations of its statute, however, the Colorado Supreme Court's confidence that Denver will not continue its arbitrary and discriminatory enforcement of its use tax statute seems sorely misplaced.

In any event, this Court has rejected the efficacy of extra-statutory oversight, either by the Constitution or by well-meaning enforcers of the law, as a cure for a vague statute. *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). The problem created by the Colorado Supreme Court's interpretation of the statute is compounded by the fact that in our self-assessment tax system, taxpayers, the *subjects* of the tax law, are in effect also the *administrators* of the tax law. The Colorado Supreme Court's interpretation of the Denver use tax law leaves the key enforcement bodies without any guidelines on how it is to be administered. Both taxpayers and those charged with enforcing the law who read and rely on the Denver use tax statute but are unaware of its constitutional problems would inevitably fail to claim or to allow the credit for taxes paid to other states or their nonmunicipal local jurisdictions.

C. The Colorado Supreme Court's strained interpretation of Denver's use tax provisions leaves taxpayers without adequate notice of what is prohibited or permitted under the Denver use tax laws.

The Colorado Supreme Court's action also fails to provide adequate notice of the credit scheme in the Denver use tax, in violation of due process. Its strained interpreta-

tion, tantamount to a judicial rewriting of the Denver use tax statute, leaves taxpayers in the dark as to what the law requires or forbids. This is because the court's interpretation of D.R.M.C. § 53-97(11) – that it allows the full credit required under the Commerce Clause – is entirely beyond the scope of a reasonably supportable statutory construction.

When a statutory interpretation is one of a number of reasonable alternatives, even though it may not be the best or even the better interpretation, it does not necessarily violate the adequate notice requirement of the Due Process Clause. In this case, however, the Colorado Supreme Court's interpretation of the Denver use tax law is plainly beyond any possible scope of reasonableness. Its reading is directly contrary to the statutory language; in their ordinary and usual meanings, "credit" and "exemption" are entirely different.[3/] D.R.M.C. § 53-92(c) specifically limits the credit to taxes paid to other municipalities, repeating the term "municipal corporation" or "municipality" three times, but not referring to states or nonmunicipal jurisdictions or taxes paid to them.

Furthermore, D.R.M.C. § 53-97(11) provides an exemption; thus, if that provision were to apply to a transaction, the transaction could not be subjected to the use tax at all. If a transaction is covered by an "exemption," any

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[3/] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 795 (1981) defines "exemption" as the "state of being exempt: freedom from any charge or obligation to which others are subject: immunity." "Exempt" is defined as "free or released from some liability to which others are subject." *Id.* In contrast, the definition for "credit" reads, among other things, "the balance in a person's favor in an account" or "a deduction from an amount otherwise due." *Id.* at 532-33.

"credit" is unnecessary because the transaction is not taxed in the first place. The Colorado Supreme Court understood that D.R.M.C. § 53-97(11) provides for an exemption rather than a credit and acknowledged "the use of 'exemption' in this context could lead to the conclusion that GM owes no tax." 990 P.2d at 70 (App. 19c). The court avoided that logical but undesirable result, however, by stating that "courts must construe tax exemptions narrowly, and in favor of the taxing authority," and by interpreting "'exemption' only to reduce the tax owed Denver by the amount of sales and use tax paid to other state and sub-state taxing jurisdictions," rather than to eliminate the tax. *Id.*

The Colorado Supreme Court's interpretation is also contrary to the plainly stated legislative intent of the Denver City Council, which enacted the partial credit scheme. Despite the specific legislative intent to limit the credit to municipal taxes, clearly reflected in D.R.M.C. § 53-92(c), and despite the express language of D.R.M.C. § 53-97(11) providing an exemption for certain sales rather than a panacea for all constitutional defects, the Colorado Supreme Court stated:

> It appears to us that Denver created this provision to prevent the courts from invalidating the use tax in its entirety upon a constitutional challenge. While not artfully drafted, the intent is clear. (990 P.2d at 70; App. 18c).

Indeed, Denver itself had never embraced the position that it was required to allow the full credit until the Airlines' case reached the Colorado Supreme Court. In addition, the Denver Sales/Use Tax Return itself provides a section for exemptions and a separate place for credits. Thus, no reason-

able taxpayer would gather from reading D.R.M.C. §§ 53-92(c) and 53-97(11) and examining the Denver Sales/Use Tax Return that he is entitled to a credit for all previously paid state and local taxes.

There is no ambiguity or vagueness on the face of D.R.M.C. §§ 53-92(c) and 53-97(11). The ambiguity or vagueness arises from the Colorado Supreme Court's attempted revision of these provisions under the pretext of statutory interpretation. As a result, reasonable taxpayers reading these provisions and trying to understand their rights and obligations under the Denver use tax will be left with no notice of what the proper credit is. Therefore, the Colorado Supreme Court's action creates uncertainty where there was none and, while curing the statute of one constitutional violation, creates another because it leaves taxpayers without the adequate notice required by the Due Process Clause. Thus, the statute is still void, despite the efforts of the Colorado Supreme Court to maintain its vitality.

The Colorado Supreme Court justified its interpretation of the statute by stating that it "attempts to construe tax ordinances so that they are valid," citing *Hiatt v. City of Manitou Springs*, 154 Colo. 525, 529, 392 P.2d 282, 284 (1964). 990 P.2d at 70 (App. 18c). But, as this Court has clearly instructed, any construction that preserves the constitutionality of the statute must still be within the range of a reasonable reading of the statute. *See United States v. Harriss*, 347 U.S. 612, 618 (1954). Thus, if the statute cannot reasonably be construed so as to be constitutional, as in this case, it must be declared unconstitutional.[4/] *See*

[4/] Even the Colorado Supreme Court has recognized that (continued...)

Associated Industries of Missouri v. Director of Revenue, 918 S.W.2d 780 (Mo. 1996).

The Colorado Supreme Court recognized the problem it has created with its contorted reading of the statutory provisions, acknowledging in *General Motors* that its

> conclusion leaves open the question of whether the Code fails to alert taxpayers of the proper credit available to them. It could be subject to a due process challenge because a law is void for vagueness when a person of ordinary intelligence cannot reasonably determine what a statute requires or forbids. (990 P.2d at 70, n.11; citations omitted; App. 19c).

The Colorado Supreme Court sidestepped this issue, however, by noting that *General Motors* "does not complain of insufficient notice. Provided that Denver grants the credits demanded by the Constitution to any use taxpayer, the notice issue may never arise." 990 P.2d at 71, n.11 (App. 19c). But this approach only places taxpayers in a "Catch 22" type of bind: Taxpayers who are aware of the constitutional problem in the credit scheme of Denver's use tax statute are ineligible to challenge it because they had notice of the problem. The only taxpayers eligible to challenge the

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4/ (...continued)
it must not do violence to the fair meaning of language employed by the legislature in its efforts to preserve the constitutionality of a statute. *Dominguez v. City and County of Denver*, 363 P.2d 661, 664 (Colo. 1961); *Williams v. City and County of Denver*, 607 P.2d 981, 983 (Colo. 1979).

constitutionality of the use tax statute are those unaware of the constitutional problem that they should be challenging.

A statute is void for vagueness if people of ordinary intelligence must necessarily guess at its meaning and will differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A taxpayer would have to be a constitutional scholar to understand the meaning of the statute in question and would have to regularly read opinions of the Colorado Supreme Court to know he is entitled to credits from Denver for sales or use taxes paid to other states or nonmunicipal jurisdictions. Imposition of such a requirement cannot be squared with any notion of due process.

II. THIS CASE PRESENTS QUESTIONS OF COMPELLING IMPORTANCE TO THE ADMINISTRATION OF STATE TAX LAWS AFFECTING TAXPAYERS ENGAGED IN INTERSTATE COMMERCE.

A. The Colorado Supreme Court's action undermines principles of self-assessment and voluntary compliance, key principles of state and federal taxation.

Voluntary compliance and self-assessment are leading principles in the administration of most types of state and federal taxes, including the Denver use tax. These principles require taxpayers to determine the correct amount of taxes they owe and thus place taxpayers in the special position of administrators of the law. In the area of tax law, therefore, providing adequate notice to taxpayers is of particular importance.

Denver has suggested that its actions would not undermine self-assessment and voluntary compliance because taxpayers may file a claim for refund for a use tax credit not specified in D.R.M.C. § 53-92(c) or claim such a credit in an audit and may petition the Denver District Court and possibly the Colorado Court of Appeals for relief if the credit is disallowed. Denver's Answer Brief to the Colorado Supreme Court, at 24-25. These suggestions illustrate that Denver has confused the principles underlying self-assessment and voluntary compliance with minimum standards for redress from the government. Self-assessment and voluntary compliance require that taxpayers know what the law requires so they can assess themselves the correct amount of tax. Procedures such as audits and litigation are mere mechanisms for correcting errors and cannot be used as a coverup for breakdowns in self-assessment occasioned by the constitutional infirmity of a statute. The Colorado Supreme Court's action does nothing to correct this state of confusion or to ensure the harmonious administration of the tax law. To the contrary, it would compel a contest by taxpayers.

A statute cannot impose the burden of a contest as a matter of course; such a burden itself would be unconstitutional. Well-intentioned administrators and judicial safeguards cannot neutralize the vice of a vague law. *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). The limitation of the credit to municipal taxes in Denver's use tax statute imposes an unconstitutional burden on taxpayers. That Denver may arbitrarily choose to relieve it following a post-deprivation proceeding does not render the statute constitutional.

B. The Colorado Supreme Court's action imposes an improper burden on taxpayers' participation in interstate commerce, an activity the Commerce Clause protects from undue state interference.

The burden on taxpayers is especially troublesome in this case because the law involves a use tax, which is primarily imposed on taxpayers engaged in interstate commerce, an activity the Constitution protects from undue state interference. In determining the degree of vagueness the Constitution tolerates as well as the relative importance of fair notice and fair enforcement, this Court has stated "the most important factor affecting the clarity that the Constitution demands of a law" is whether the statute in question threatens to inhibit the exercise of "constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

Participation in interstate commerce is a right protected by the Constitution. *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) ("The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation"); *see also Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 (1977); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891). Thus, the need for legislative clarity and fairness in state law is especially great in this case. In light of the numerous citizens and businesses engaged in interstate commerce who are affected by such a statute, the Court must address the action of the Colorado Supreme Court, which created a due process violation in its efforts to remedy a Commerce Clause violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 21, 2000

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SUPREME COURT, STATE OF COLORADO
No. 98SC485 January 24, 2000

UNITED AIRLINES, INC., a Delaware corporation; and AIR WISCONSIN, INC., a Wisconsin Corporation, Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule city and Colorado municipal corporation, Respondent.

Certiorari to the Colorado Court of Appeals
EN BANC AFFIRMED

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PER CURIAM
JUSTICE SCOTT does not participate.

Petitioners filed a Petition for Writ of Certiorari to review United Airlines, Inc. v. City and County of Denver, 973 P.2d 647 (Colo. App. 1998). On March 29, 1999, this Court (Justice Scott not participating) granted the Petition for Writ of Certiorari as to the following issue:

> Whether the Court of Appeals erred in holding that section 53-97(11) of the Denver Revised Municipal Code allows section 53-92(c) of the Code to be applied so as not to violate the Commerce Clause of the United States Constitution.

On December 6, 1999, this Court issued its opinion in General Motors Corp. v. City and County of Denver, 990 P.2d 59 (Colo. 1999), and simultaneously issued an order in the instant case denying certiorari as having been improvidently granted. The Petitioners timely filed a Petition for Rehearing, as allowed under C.A.R. 54(b), in which they request us to vacate the December 6, 1999 order and reinstate the previously granted writ of certiorari. In the alternative, the Petitioners request this Court to issue a *per curiam* opinion if we determine that the General Motors decision properly disposes of the Peititioners' constitutional challenge.

We view our decision in General Motors as fully and completely addressing the issue on which we granted certiorari in this case. Accordingly, the order of December 6, 1999 is withdrawn, the writ of certiorari is reinstated, and the judgment of the court of appeals is affirmed based on our reasoning in

General Motors. The Petition for Rehearing is otherwise denied.

SUPREME COURT, STATE OF COLORADO
CASE NO. 98SC485
CERTIORARI TO THE COLORADO COURT OF APPEALS, 97CA0151
DISTRICT COURT, CITY & COUNTY OF DENVER, 96CV1195

ORDER OF COURT

UNITED AIRLINES, INC., a Delaware corporation; and AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule city and Colorado municipal corporation,

Respondent.

Upon consideration of the Record of Appeal, together with the written and oral arguments of counsel, and now being sufficiently advised in the premises,

IT IS ORDERED that the Writ of Certiorari heretofore granted be, and hereby is, DENIED as having been improvidently granted.

BY THE COURT, EN BANC, DECEMBER 6, 1999.
JUSTICE SCOTT does not participate.

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GENERAL MOTORS CORPORATION, d/b/a
General Motors Emissions Laboratory,
Plaintiff-Appellee/Cross-Appellant,

v.

The CITY AND COUNTY OF DENVER, Tami A. Tanoue, as Hearing Officer for the Manager of Revenue of the City and County of Denver, State of Colorado; and Cheryl Cohen, as the Manager of Revenue of the City and County of Denver, State of Colorado, Defendants-Appellants/Cross-Appellees.

No. 98SA220.
Supreme Court of Colorado,
En Banc.
Dec. 6, 1999.

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Daniel E. Muse, City Attorney, Robert F. Strenski, Assistant City Attorney, Denver, Colorado, Attorneys for Defendants-Appellants/Cross-Appellees.

Justice KOURLIS delivered the Opinion of the Court.

In this case, we determine whether the City and County of Denver (Denver) may impose a use tax on automobiles owned by General Motors Corporation (GM) and used in Denver for 1 to 4% of their total useful life. We hold that the Commerce Clause does not prohibit such a tax, subject to the limitation that Denver's tax must be offset by a credit for any sales or use taxes on the wholesale value of the parts and

materials used to construct the vehicles that GM may have incurred for purchases or uses in foreign states prior to their arrival in Denver. We then consider whether GM is entitled to either of two statutory exemptions from the Denver use tax, and hold that it is not.

I.

In 1995, the Denver Manager of Revenue conducted a tax audit of the Denver operations of GM for the period of January 1, 1989 to August 31, 1994. GM is a Delaware corporation with headquarters in Detroit, Michigan. During the audit period, GM's Powertrain Division operated the Denver Vehicle Emissions Testing Lab (the Denver Lab). The Powertrain Division brought approximately one-thousand vehicles to the Denver Lab each year, with an average of twenty to thirty vehicles at the lab each day. Following its audit of GM's Denver operations, the Manager of Revenue imposed a 3.5% use tax on approximately 82% of the vehicles that had passed through the lab between 1989 and 1994.[1] The taxed vehicles fell into three groups: emissions test vehicles, powertrain drive development vehicles, and "drive trip" test vehicles.

Emissions test vehicles, comprising 40% of the vehicles, represented the largest of the three groups. To create the emissions test vehicles, the Powertrain Division acquired current production model automobiles from GM's assembly lines in Michigan and refit the vehicles to simulate production models planned for a future year. The prototype vehicles then spent eight to twenty months in Michigan, undergoing perfor-

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[1] GM does not contest the tax imposed by Denver on the other 18% of the vehicles that passed through the Denver Lab.

mance stabilization and testing. Then, the Powertrain Division shipped them via common carrier to the Denver Lab. While in Denver, engineers ran the vehicles through approximately two weeks of high altitude emissions testing, both in the lab and on the roads of Denver and the surrounding mountains, before shipping the vehicles to other GM test centers in the United States and Canada. After an average test life of thirty-five months and twelve-thousand miles, during which GM occasionally brought the vehicles back to Denver, GM returned the vehicles to Michigan and either scrapped them, or sold them at auction. On average, the emissions test vehicles spent 2 to 4% of their useful lives in Denver and traveled 1.5% of their total miles in Denver.

Unlike the emissions test vehicles, the powertrain drive development vehicles, comprising 32% of the vehicles, did not undergo any testing in the Denver Lab. Rather, the Powertrain Division shipped these vehicles to the Denver Lab, where they sat for a short period—usually less than a few days—before engineers drove them into the mountains for road testing.

Lastly, drive trip test vehicles, comprising 10% of the vehicles, were vehicles that GM's engineers tested while driving on road trips across the country.[2] The Denver Lab served as a drop-off point for these vehicles, where lab personnel washed and performed minor maintenance on them before shipping them to other locations, usually within a matter of a few days. Both the powertrain drive development and drive trip test vehicles spent less than 1% of their useful lives and total miles in Denver.

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[2] *See supra* note 1.

Following its audit of these operations, Denver issued GM a notice of use tax deficiency totaling $2,868,632.96 based on the full value of the vehicles that passed through Denver. Subsequently, pursuant to this court's holding in *International Business Machines Corp. v. Charnes,* 198 Colo. 374, 601 P.2d 622 (1979), Denver issued a modified assessment for $1,044,199.16 based on the full value of the materials used to construct the vehicles, rather than the full retail value of the completed vehicles. This modified figure included an interest charge and a 10% tax penalty of $70,345.34 pursuant to D.R.M.C. § 53-114(a) (1993) for late remittance.

Denver provided GM with a tax credit under D.R.M.C. § 53-92(c) (1993) for any sales or use taxes paid by GM to *other municipalities* on the materials costs of the vehicles *prior* to the vehicles' arrival in Denver.[3] Pursuant to that provision,

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[3] D.R.M.C. § 53-92(c) states:

> It is hereby to be the legislative intent of the city...that the provisions of this article shall apply to any person who has already paid a retail sales tax or a use tax in respect to the sale or a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city, but the tax imposed by this article shall, in such event, be measured by the difference between the amount imposed by this article and the amount previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of

(continued...)

however, Denver declined to credit any portion of foreign taxes paid on the value of the labor and overhead used to complete the vehicle or any taxes imposed on the vehicles *after* their departure from Denver. Denver calculated the proper credit to be $4,924.37, as compared to GM's total tax payments of $981,413.82 to other jurisdictions for uses before the vehicles were in Denver and after their departure.

GM contested Denver's assessment in a formal hearing before the Manager of Revenue, arguing that the use tax violated the Commerce Clause of the United States Constitution[4] because it was not fairly apportioned and lacked a sufficient nexus to GM's initial purchase of the vehicles in Michigan. As such, GM contended that its activities should be exempt from the use tax under D.R.M.C. § 53-97(11) (1993), which excludes "[a]ll sales which the city is prohibited from taxing under the Constitution." *Id.* Alternatively, GM argued that its activities fell within two other municipal code exemptions. *See* D.R.M.C. § 53-97(9) (1993) (granting an exemption for temporary personal use within Denver); D.R.M.C. § 53-97(12) (1993) (granting an exemption for vehicles registered outside of Denver). The hearing officer affirmed the assessment of the tax in its entirety, finding that it did not violate the Commerce Clause and that GM was not entitled to

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[3] (...continued)
the privilege of using, storing, distributing or consuming such service or personal property in the city.

Id.

[4] *See* U.S. Const. art. I, § 8, cl. 3 (stating that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

claim either exemption to the tax. On review, the Denver District Court struck down the assessment, holding that GM fell within the D.R.M.C. § 53-97(9) temporary personal use exemption. In addition, anticipating an appeal concerning the application of that exemption, the district court addressed GM's constitutional arguments. The court found that Denver did not have a sufficient nexus to the Powertrain Division's original "purchase" of the parts and materials that comprised the vehicles. In addition, the court found that the tax was not "externally consistent" because it was not apportioned in a fashion that accounted for the fact that the vehicles spent only a small portion of their useful lives in Denver.

We have appellate jurisdiction pursuant to section 13-4-102(1)(b). 5 C.R.S. (1999), and we now affirm in part, reverse in part, and remand for a determination of the proper credit for the sales and use taxes paid by GM prior to the vehicles' arrival in Denver.

II.

Denver's municipal use tax is set forth in D.R.M.C. § 53-96(1) (1993), which states:

> There is levied and there shall be collected and paid a tax in the amount stated in this article, by every person exercising the taxable privilege of storing, using, distributing or consuming in the city a service subject to the provisions of this article or any article of tangible personal property, purchased at retail, for said exercise of said privilege, as follows: (1) On the purchase price paid or charged upon all

sales and purchases of tangible personal property.

Id. The code defines "use" as: "the exercise, *for any length of time*, by any person within the city of any right, power or dominion over tangible personal property or services." D.R.M.C. § 53-95(30) (1993) (emphasis added). It defines storage as "any keeping or retention of, or exercise of dominion or control over, or possession for any length of time of tangible personal property." D.R.M.C. § 53-95(23) (1993). Finally, the code defines "retail sale" as "any sale ... except a wholesale sale," D.R.M.C. § 53-95(19) (1993), where a wholesale sale is defined in relevant part as "[a] sale by wholesalers to licensed retail merchants ... or other wholesalers for resale." D.R.M.C. § 53-95(31)(a) (1993).

By these definitions, the use tax code "reflects a broad legislative intent to impose sales taxes or use taxes upon the great majority of purchases of tangible personal property." *A.B. Hirschfeld Press, Inc. v. City & County of Denver,* 806 P.2d 917, 920 (Colo. 1991). "The definition of retail sale is broadly inclusive, encompassing all sales except wholesale sales. The use tax is to be imposed on the purchase price of all tangible personal property that is purchased at retail for use, storage, distribution or consumption." *Id.*

This broad scope reflects the purpose of the Code. We have previously noted that "Denver's use tax is intended to prevent individuals and businesses from purchasing property in another jurisdiction in order to avoid paying a sales tax in Denver." *Winslow Constr. Co. v. City & County of Denver,* 960 P.2d 685, 692 (Colo.1998). Use taxes such as this one arose shortly after the advent of sales taxes in the 1930s as a means to "safeguard State sales tax revenues from erosion by purchases of goods outside the State, and to protect local mer-

chants from loss of business to border and other States that either have no sales tax or whose sales tax rate is lower than that of the merchant's State." 2 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 16.01 (1992) [hereinafter 2 Hellerstein & Hellerstein].

The United States Supreme Court has upheld the constitutionality of these so-called "compensating use taxes" since their inception, based on the theory that the taxes fall upon an in-state event: the use, storage, consumption, or distribution of property within the state. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct. 1023, 88 L.Ed.1304 (1944) ("A sales tax is a tax on the freedom of purchase.... A use tax is a tax upon the enjoyment of that which was purchased."); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587-88, 57 S.Ct. 524, 81 L.Ed. 814 (1937) (upholding the constitutionality of an early California use tax).

As Denver recognized in its modified tax assessment, under Colorado law, the use tax base is not the retail value of GM's vehicles, but rather the value of the component parts. *See International Bus. Machs. Corp. v. Charnes*, 198 Colo. 374, 379, 601 P.2d 622, 626 (1979). In *IBM*, we noted that when a manufacturer withdraws a product from its inventory for its own use, the parts and materials that the manufacturer used to build that product no longer qualify for a manufacturing exemption to the Colorado sales and use tax. *See id.* at 378, 601 P.2d at 625. As such, at the time of the withdrawal, the original wholesale purchase is converted to a retail purchase for purposes of the use tax. *See id.* at 378-79, 601 P.2d at 625-26. Because the original exempt purchases were for parts and materials, in *IBM* we held that the Colorado Department of Revenue could tax the value of the parts and materials, but not the "full finished cost" of the completed product. *See id.* at

379, 601 P.2d at 626. We noted that taxing the full finished cost would "have the effect of taxing the company's labor and overhead," and thus, would effectively operate as a "value added tax." *Id. at* 377, 601 P.2d at 624-25. In other words, such a value-added tax would exceed the intended purposes of the use tax because it would more than offset the sales tax revenues due to Colorado if the taxpayer purchased the parts and materials in-state.

The parties do not dispute that the Denver use tax, if constitutional, applies on its face to the parts and materials in GM's test vehicles. Their dispute concerns first, whether the tax as applied is constitutional under the dormant Commerce Clause; and second, whether, even if the tax is constitutional, it nonetheless cannot be collected because of statutory exemptions to the use tax.

III.

We turn first to the constitutionality of the tax under the Commerce Clause. In this regard, we conduct a de novo review of the district court's constitutional determinations. *See People v. District Court*, 953 P.2d 184, 187 n. 4 (Colo.1998) ("A constitutional standard is a question of law subject to de novo review on appeal.").

Although states may tax intrastate commerce as they deem fit, the Constitution imposes limitations on the exercise of state taxing power over interstate commerce. The United States Supreme Court explained the constitutional origin of these limitations in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995):

> Despite the express grant to Congress of the power to "regulate Commerce...among the several States," U.S. Const., Art. I, § 8, cl. 3, we have consistently held this language to contain further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject. We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Id. at 179-80, 115 S.Ct. 1331 (some citations and internal quotation marks omitted). The dormant Commerce Clause does not, however, "immunize" interstate commerce and its instrumentalities from state taxation: indeed, "[f]requently it has been said that interstate business must pay its way." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 165, 74 S.Ct. 396, 98 L.Ed. 583 (1954).

Under the Supreme Court's holding in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), a state tax does not offend the dormant Commerce Clause if it meets four requirements: (1) it applies to an "activity with a substantial nexus with the taxing State"; (2) it is "fairly apportioned"; (3) it "does not discriminate against interstate commerce"; and (4) it is "fairly related to the services provided by the State."[5] *Id.* at 279, 97 S.Ct. 1076. The district court held that Denver's tax violated the first two prongs of this test.

A.

We turn then to the first prong of the *Complete Auto* test: whether, in this case, Denver's use tax applies to an "activity with a substantial nexus with the taxing State." *Id.* at 279, 97 S.Ct. 1076. Under this test, a jurisdiction may impose a tax obligation so long as "facts demonstrate some definite link, some minimum connection, between the State and the person it seeks to tax." *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 561, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) (internal quotation marks omitted).

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[5] Local taxing authorities, like states, are subject to the negative Commerce Clause and the *Complete Auto* test. *See Dean Milk Co v. City of Madison*, 340 U.S. 349, 353-57, 71 S.Ct. 295, 95 L.Ed. 329 (1951) (striking Madison's sale of milk ordinance on Commerce Clause grounds); *Burbank-Glendale-Pasadna Airport Auth. v. City of Burbank*, 64 Cal.App.4th 1217, 76 Cal. Rptr. 2d 297, 300-01 (1998) (denying a Commerce Clause challenge to a city's parking tax); *Allegro Servs., Ltd v. Metropolitan Pier & Exposition Auth.*, 172 Ill.2d 243, 216 Ill. Dec. 689, 665 N.E.2nd 1246, 1256-60 (1996) (upholding an airport departure tax imposed by the Metropolitan Pier and Exposition Authority).

As this test suggests, the "sufficient nexus" requirement does not pose a particularly difficult hurdle for most state taxes. For instance, in *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), the Supreme Court upheld an unapportioned gross receipts tax that Washington State imposed on the in-state sales of an out-of-state corporation, even though the company had only a single full-time employee working from his home in Washington. Standard Pressed Steel argued that its "in-state activities were so thin and inconsequential as to make the tax" unconstitutional, but the Court characterized this argument as "verg[ing] on the frivolous." *Id.* at 562, 95 S.Ct. 706. The Court noted that the full-time employee "made possible the realization and continuance of valuable contractual relations" between Standard Pressed Steel and a large in-state corporation, the Boeing Company. *Id.*; *see also Talbots, Inc. v. Schwartzberg*, 928 P.2d 822, 825 (Colo.App.1996) (holding that the Denver municipal use tax met the first prong of *Complete Auto* where Denver imposed it upon catalog mailings from a department store having two retail outlets in Denver).

In fact, it is only where a state's contacts with interstate commerce are truly de minimis that the first prong of Complete Auto will operate to invalidate a tax. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (concluding that a mail order business's lack of any physical presence in the state precluded the state from collecting a use tax); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 631, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973) (stating in dicta that a state would have an insufficient nexus to tax an airplane's consumption of fuel based solely on the aircraft's flight over the state); *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 758-60, 87 S.Ct. 1389, 18

L.Ed.2d 505 (1967) (holding that a state had an insufficient nexus to require an out-of-state mail order firm to collect and pay use taxes where the firm's only contacts with the state constituted catalogs and merchandise mailed to state residents), *overruled in part on other grounds by Quill Corp.*, 504 U.S. at 306-08, 112 S.Ct. 1904.

Here, in considering the first prong of *Complete Auto*, the district court held:

> There is no doubt General Motors has a presence in the City and County of Denver, the question is whether there is a substantial nexus between the City and the *sale of parts* which the City now wishes to tax.
>
> The City's argument fails to establish that there is a substantial nexus between the City and the transaction that it wishes to tax.

(emphasis added). We hold that the trial court's reading of the first prong of the *Complete Auto* test was misdirected. The use tax does not tax the out-of-state *sale* of parts; rather, its incidence falls upon the in-state storage, use, distribution, or consumption of those parts. *See* D.R.M.C. § 53-96(1) (imposing Denver's use tax on the privilege of storing, using, distributing, or consuming property within the city); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587, 57 S.Ct. 524, 81 L.Ed. 814 (1937) (rejecting a challenge that a use tax violated the Commerce Clause where the challenge asserted that the tax "though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge"). Thus, it is GM's in-state storage, use, distribution, or consumption of

automobile parts that must bear a substantial nexus with Denver. *See Complete Auto*, 430 U.S. at 279, 97 S.Ct. 1076.

On this point, we find that GM's use and storage of over one-thousand vehicles per year, with the company's corresponding employment of state residents and its operation of the Denver Lab facilities, created a sufficient nexus with Denver. Thus, we conclude that Denver's imposition of the use tax did not violate the first prong of the *Complete Auto* test.

B.

We turn then to the second prong of *Complete Auto*, and the more difficult question in this case: whether Denver's use tax is "fairly apportioned." *Id.* at 279, 97 S.Ct. 1076. The "central purpose" of this prong is to " 'ensure that each State taxes only its fair share of an interstate transaction.' " *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989)). In *Jefferson Lines*, the Supreme Court observed:

> This principle of fair share is the lineal descendant of [the] prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it.

Jefferson Lines, 514 U.S. at 184-85, 115 S.Ct. 1331. The Supreme Court examines the "threat of malapportionment" by making two somewhat interrelated inquiries: "whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well." *Id.* at 185, 115 S.Ct. 1331. We examine each of these requirements in turn.

A state tax is internally consistent if it is structured" so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261, 109 S.Ct. 582.

> A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331. To avoid multiple taxation, a tax upon interstate commerce must either be apportioned to relate the tax to the activity taking place within the taxing state or it must allow a credit for other similar taxes paid by the taxpayer in other jurisdictions. *See Goldberg*, 488 U.S. at 264, 109 S.Ct. 582. Either method is equally suitable as a means of meeting the "fairly apportioned" prong of *Complete Auto*. *See Jefferson Lines*, 514 U.S. at 195, 115 S.Ct. 1331 (rejecting "the idea that a particular apportionment formula must be used simply because it would be possible to use it"). Furthermore, the fairly apportioned test "does not require [the] State to adopt a tax which would 'pose genuine administrative burdens.'" *Goldberg*, 488 U.S. at 264, 109 S.Ct.

582 (quoting *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987)).

Indeed, as we discuss further *infra*, to avoid the burdens of administering fractional apportionment mechanisms, the overwhelming majority of states meet the "internal consistency" test by providing a credit for sales or use taxes paid to other states. *See* Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L.Rev. 138, 160 (1988); *see also Barringer v. Griffes*, 1 F.3d 1331, 1336 (2d Cir.1993) (observing that "where the Supreme Court examines compensating use taxes under the internal consistency test, such taxes have been upheld as fairly apportioned when they provided for a credit, but have been rejected where no credit was allowed for taxes paid to other states"). However, the crediting structure must be designed properly. Internal consistency requires that states impose identical taxes when viewed in the aggregate—as a collection of state and sub-state taxing jurisdictions. In other words, the interstate taxpayer should never pay more sales or use tax than the intrastate taxpayer.[6]

The City and County of Denver's municipal code offers tax credits for sales and use taxes imposed by other municipalities, *see* D.R.M.C. § 53- 92(c), and the Colorado sales and use tax affords a similar credit for sales and use taxes imposed by other states. *See* § 39-26-203(1)(k), 11 C.R.S. (1999). Denver argues that the establishment of identical tax crediting schemes throughout the country would not lead to the assessment of an unconstitutional tax burden on interstate taxpayers. We

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[6] Denver need not credit sales and use taxes paid for uses in other states after departure of the automobiles from Colorado. *See* D.R.M.C § 53-92(c).

disagree, and find Denver's taxing structure to be internally inconsistent because Denver's credit mechanism could cause multiple taxation even if every state and municipality were to impose a taxing scheme similar to the one present in Colorado and Denver.[7]

For example, if Colorado imposed a 1% sales or use tax and Denver a 2% tax, a purchaser or user would owe a 3% total tax. Similarly, if Michigan collected a 2% sales or use tax and Detroit a 1% tax, a purchaser or user in Detroit would pay a 3% total tax. However, a user who purchased the item in Detroit would be subject to an additional 1% tax upon the storage or use of the item in Denver because section 53-92(c) only credits taxes paid to other municipalities. Thus, Denver's use tax could burden interstate commerce if every other state and municipality employed the same tax structure as Colorado and Denver, but imposed different tax rates.[8]

Although when viewed in isolation section 53-92(c) provides an internally inconsistent crediting scheme, D.R.M.C. 53-97(11) operates to save it from such a constitutional failure.[9]

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[7] A statute may violate the "internal consistency" doctrine if the tax subjects a multi-state taxpayer to the risk of multiple taxation. *See American Trucking Ass'ns. Inc v. Sheiner*, 483 U.S. 266, 284-85, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987); 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.06[1][a] (1993) [hereinafter 1 Hellerstein & Hellerstein].

[8] We recognize that United States Case Law does not require that states and municipalities examine the laws of all other states when establishing taxes. We provide this example to demonstrate that Denver's use tax scheme permits multiple taxation.

[9] GM argues that D.R.M.C. § 53-97(11) should exempt it from all

(continued...)

"There shall be exempt from taxation under the provisions of this article...(11)[a]ll sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state." D.R.M.C. 53-97(11). It appears to us that Denver created this provision to prevent the courts from invalidating the use tax in its entirety upon a constitutional challenge. While not artfully drafted, the intent is clear.

This court attempts to construe tax ordinances so that they are valid. *See Hiatt v. City of Manitou Springs*, 154 Colo. 525, 529, 392 P.2d 282, 284 (1964). In reviewing the interplay of the same Denver municipal code provisions, the court of appeals stated that "a taxpayer may seek an exemption from the use tax if Denver fails to give full credit for taxes paid in other taxing jurisdictions, including states, counties, and municipalities." *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647, 654 (Colo.App.1998), *cert. denied as improvidently granted*, No. 98SC485 (Colo. Dec. 6, 1999).[10] We agree with the court of appeals' analysis.

On its face, D.R.M.C. § 53-97(11)'s language exempts "[a]ll sales." The use tax portion of the code uses "purchases" and "sales" interchangeably. *See* D.R.M.C. § 53-95(21)(1993)

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9 (...continued)
tax because of the unconstitutional crediting scheme. We find this interpretation to be incorrect. Denver may lawfully tax GM's use of the automobiles in Denver, but it must tax GM in a constitutional manner.

10 We granted certiorari in *United* on March 29, 1999 contemporaneously with our receipt of the briefs in this case. After a closer investigation of the issues presented, we determine that we improvidently granted certiorari in *United* and accordingly now dismiss it.

(defining "*[s]ale* or *purchase* or *sale and purchase*."). Consequently, section 53-97(11) exempts all constitutionally protected sales and *purchases*. Although Denver seeks to tax GM's use of the automobiles in Denver, not their sale or purchase, Denver bases the amount of tax on the purchase price paid. This tax determination, and the placement of the exemptions within the use tax portion of its code convince us that Denver intended this exemption to apply to its use tax.

We understand that the use of "exemption" in this context could lead to the conclusion that GM owes no tax. However, courts must construe tax exemptions narrowly, and in favor of the taxing authority. *See Security Life & Accident Co. v. Heckers*, 177 Colo. 455, 458, 495 P.2d 225, 226-27 (1972); *Regional Transp. Dist. v. Charnes*, 660 P.2d 24, 25 (Colo.App.1982). Thus, we interpret "exemption" only to reduce the tax owed Denver by the amount of sales and use tax paid to other state and sub-state taxing jurisdictions.[11]

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[11] Our conclusion leaves open the question of whether the Code fails to alert taxpayers of the proper credit available to them. It could be subject to a due process challenge because a law is void for vagueness when a person of ordinary intelligence cannot reasonably determine what a statute requires or forbids. *See People v. Nissen*, 650 P.2d 547, 550 (Colo.1982); *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 105 (Mo.1997). This requirement allows people to conduct themselves in accordance with law, and prevents arbitrary and discriminatory application of the law. *See Nissen*, 650 P.2d at 550; *Missourians*, 959 S.W.2d at 105.

Here, GM does not complain of insufficient notice. Provided that Denver grants the credits demanded by the Constitution to any use taxpayer, the notice issue may never arise.

Our interpretation of D.R.M.C. § 53-97(11) saves Denver's use tax from constitutional invalidity. However, Denver must provide GM with a credit for the sales and use taxes paid to other states and their subdivisions such that GM will pay no more tax on the automobiles than it would have paid by purchasing the component parts in the City and County of Denver, State of Colorado.

C.

We turn then to a consideration of whether the use tax comports with the requirements of external consistency. In contrast to internal consistency, external consistency "looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). In other words, the state may only impose a tax on interstate activity that "reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989).

Evaluation of external consistency requires an examination of "the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity." *Id.* at 262, 109 S.Ct. 582. If there is a threat of "real multiple taxation," the state may be engaging in "impermissible overreaching." *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331. No internally consistent sales tax has failed the external consistency test for lack of further apportionment. *See id.* at 192, 115 S.Ct. 1331.

In the context of income taxes or taxes on gross receipts, apportionment *must* take into account the location where revenue is generated. *See id.* at 186-90, 115 S.Ct. 1331. Similar apportionment of sales and use taxes would present substantial administration and collection difficulties. *See, e.g., KSS Transp. Corp. v. Baldwin*, 9 N.J.Tax 273, 284 (1987) ("Due to the nature of the sales and use tax, it is impractical to apportion this tax."); 2 Hellerstein & Hellerstein ¶ 18.04[1]. In a likely effort to avoid the foreseeable administration and collection difficulties of such a system, forty-four of forty-five states that impose sales and use taxes employ crediting mechanisms to prevent multiple taxation on sales and use taxes. *See* 2 Hellerstein & Hellerstein ¶ 18.08[1]; *American Bar Association Section on Taxation Sales and Use Tax Deskbook*, 1998-99 Edition (1998). As the Supreme Court has noted:

> "These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed ... or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes a tax measured only by the differential rate."

Jefferson Lines, 514 U.S. at 194, 115 S.Ct. 1331 (quoting *KSS Transp. Corp.*, 9 N.J.Tax at 285). Without exception, and as GM's state taxation expert testified in the administrative hearing below, the Supreme Court has "commented favorably"[12] on the States' use of crediting mechanisms as a

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[12] 2 Hellerstein & Hellerstein ¶ 18.04(1). Walter Hellerstein, who co-authored this two-volume treatise with his father, is a promi-

(continued...)

means of avoiding multiple taxation problems. *See, e.g., Goldberg*, 488 U.S. at 264, 109 S.Ct. 582 (holding that a tax on interstate telephone calls does not violate the external consistency requirement because "[t]o the extent that other States' telecommunications taxes pose a risk of multiple taxation, the

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12 (...continued)
nent commentator on state taxation law and was an expert witness for General Motors in this case. The Hellersteins' work contains the following hypothetical railroad examples:

> [R]ailroad cars and other equipment passing through a State, whether or not there is loading or unloading in the State, should, at least theoretically, be subject to use tax within the States if the tax is fairly apportioned, although as stated below, apportionment is not a viable, practical solution to such a tax.
>
> By the same token, a railroad transporting passenger cars through a State would appear to be subject to a properly apportioned use tax, even though no stops are made in the State to receive or discharge passengers. However, sales and use taxes do not readily lend themselves to apportionment among the States. Instead, the States allow credits against their use taxes for sales or use taxes imposed by other States. The Supreme Court has commented favorably on the allowance of such credits as a way of eliminating multiple sales-use taxation of interstate commerce.

2 Hellerstein & Hellerstein ¶ 18.04[1] (footnotes omitted).

credit provision contained in the Tax Act operates to avoid actual multiple taxation."); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) ("We have no doubt that the second ... element[ ] of [*Complete Auto* is] satisfied. The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States."); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 245 n. 13, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) ("Many States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereigns have jurisdiction to tax parts of the same chain of commercial events.").[13]

Contrary to GM's arguments here, the external consistency requirement does not require that sales and use taxes be apportioned based on the length of time tangible property remains in the taxing jurisdiction. For instance, in *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo.1987), the Missouri Supreme Court upheld the imposition of a Missouri use tax on an aircraft that was leased to an Ohio company and hangared and maintained in Ohio. *See id.* at 507-08. The Missouri court noted that the plane spent 17.7% of its total flight hours in Missouri, and stayed there for periods ranging from two to nine days. *See id.*; *see also United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973) (upholding Illinois' imposition of a use tax on the

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[13] The Court has also endorsed apportionment formulas based on the number of miles a bus, train, or truck has traveled within a taxing jurisdiction. *See Goldberg*, 488 U.S. at 264, 109 S.Ct. 582. However, the Court has noted that these cases "all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.*

full value of fuel stored in Illinois for two to twelve days prior to its loading onto commercial aircraft).

Similarly, the Vermont Supreme Court in *Whitcomb Constr. Corp. v. Commissioner of Taxes*, 144 Vt. 466, 479 A.2d 164 (1984) upheld Vermont's imposition of a use tax on the full value of a New Hampshire-owned aircraft that spent 17% of its flight time in Vermont. *Id.* at 165. The Vermont Supreme Court overruled a trial court's decision that had apportioned the taxpayer's liability based on the amount of time the aircraft spent in Vermont:

> The Commerce Clause does not require apportionment in addition to a tax credit. The rule of *Complete Auto* ... requiring a tax on interstate commerce to be "fairly apportioned" is satisfied here. The state has provided a tax credit in lieu of apportionment. This credit, not unlike a proportionate tax, eliminates the possibility of cumulative use tax liability. The Vermont legislature has chosen not to incorporate apportionment within the use tax scheme. This Court, therefore, is without power to impose such a requirement. We agree with the Commissioner that apportionment of this tax is neither constitutionally required nor legislatively authorized.

Id. at 168 (citation omitted). This principle reflects the notion that use taxes actually compensate for a sale that took place in another jurisdiction. Hence, it is irrelevant for purposes of a use tax, just as it is irrelevant for purposes of a sales tax, how long the property remains in the taxing jurisdiction. *See Jefferson Lines*, 514 U.S. at 186, 115 S.Ct. 1331.

Thus, use taxes are externally consistent if the contested tax contains a credit that operates to eliminate multiple taxation. This rule holds true regardless of how long the property remains in the taxing jurisdiction. If the use tax in question contains an effective credit, it is externally consistent. Like the Vermont Supreme Court, we decline to impose an apportionment requirement where the responsible legislative body has chosen not to enact one.

D.

For purposes of our de novo review, we apply the third and fourth prongs of the *Complete Auto* test, which the parties did not vigorously contest before the Manager of Revenue and upon which the district court did not rule. We find that Denver's tax comports with both requirements because D.R.M.C. § 53-97(11) prevents any discrimination, and the tax bears a substantial nexus to the services provided by Denver to GM.

Under the third prong of *Complete Auto*, we hold that Denver's use tax does not discriminate against interstate commerce. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). A state may not allocate tax burdens between insiders and outsiders in a facially discriminatory manner. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 281, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). Denver's use tax equally applies to state residents and "outsiders." *See* D.R.M.C. § 53-96. By providing a credit for all sales and use taxes paid to other states, Denver's use tax does not discriminate against interstate commerce.

Under the fourth and final prong of *Complete Auto*, Denver's use tax must be "fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279, 97 S.Ct. 1076. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg*, 488 U.S. at 266-67, 109 S.Ct. 582. The taxpayer enjoys a "wide range" of benefits from the state including "police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society." *Id.* at 267, 109 S.Ct. 582. However, the imposed tax "need not be limited to the costs of the services incurred by the State on account of [the taxed] activity." *Id.* " '[T]he simple but controlling question is whether the state has given anything for which it can ask return.'" *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 109, 95 S.Ct. 1538, 44 L.Ed.2d 1 (1975) (quoting *General Motors Corp. v. Washington*, 377 U.S. 436, 441, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), *overruled on other grounds by Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 242, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987)).

Here, GM's use of automobiles at its Denver Lab and on the streets of Denver was afforded all of the benefits that Denver provides to its other citizens—including fire and police protection, social services, utilities, road construction and maintenance, and all the "other advantages of civilized society." *Goldberg*, 488 U.S. at 267, 109 S.Ct. 582. Thus, we find that Denver's decision to impose a use tax, amounting to a one-time cost of approximately $300 per vehicle that GM brought to Denver, was fairly related to the services provided by Denver.

In sum, we find that Denver's assessment of its use tax on the vehicles that GM brought into Denver violates the

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e Clause under the test that the Supreme *Complete Auto* because it could result in the ater tax on an out-of-state taxpayer than on r for the same product under certain circum- er, we interpret D.R.M.C. § 53-97(11) as e tax from that flaw by requiring that Denver ax as constitutionally permissible. Accord- t Denver affords GM the credits to which it l that Denver's use tax survives constitutional

IV.

We now
two statutory exe
are applicable to
D.R.M.C. § 53-
D.R.M.C. § 53-9

onsider whether GM qualifies for either of ptions to Denver's use tax that GM contends its use of automobiles within Denver. *See* 7(9) (temporary personal use exemption); (12) (registered vehicle exemption).

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Colo. 49, 57, 49
v. Heckers, 182
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a strong presumption in Colorado against tax *Verde Co. v. Board of County Comm'rs*, 178 P.2d 229, 233-34 (1972); *see also Hagood* olo. 337, 348, 513 P.2d 208, 214 (1973). is on the taxpayer who claims an exemption the right to such exemption," *Security Life Heckers*, 177 Colo. 455, 458, 495 P.2d 225, e "exemption will be strictly construed in g authority." *Regional Transp. Dist. v.* 24, 25 (Colo.App.1982); *see also* D.R.M.C. 3) (placing the burden of proving that an apply to a given tax assessment on the

A.

The district court held that GM was entitled to an exemption under the temporary personal use exemption of D.R.M.C. § 53-97(9), which states:

> There shall be exempt from taxation under the provisions of this article the following:
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> ...
>
> (9) Sales[14] of tangible personal property purchased outside the city for use, storage, distribution or consumption outside the city by a nonresident of the city while the property is temporarily within the city for the purchaser's own personal use, storage or consumption.

Id. (footnote added). GM contends, and the district court agreed, that this exemption includes businesses that use property temporarily within Denver for internal business purposes, where there is no immediate financial gain to the business from the use.

In response, Denver first argued to the trial court that this exemption does not apply because GM *resides* in Denver

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[14] The plain meaning of "sales" in this exemption suggests that it does not exempt "uses" of tangible personal property. However, an almost identical section appears in the sales tax portion of the D.R.M.C. *See* D. R.M.C.§ 53-26 (1993). The location of § 53-97–within the use tax article–and the presence of a similar list of exemptions in the sales tax article convince us that the exemptions contained in § 53-97 apply to the "taxable privilege of storing, using, distributing or consuming ... tangible personal property." D.R.M.C. § 53-96.

and does not qualify as a "nonresident." It further argues here that the internal use of property by a business is a commercial or business use regardless of whether there is immediate financial gain from the use, and that the district court should have deferred to the Manager of Revenue's administrative interpretation of the exemption to this effect. In support of its contentions, the city indicates that the purpose of the exemption was to encourage people to travel to Denver without fear of being taxed during temporary visits, and to exempt personal uses of goods that would be difficult to track. We conclude that Denver has the better of these arguments.[15]

The use of "nonresident" in section 53-97 raises the question of whether GM meets the requirements of the exemption. If "nonresident" includes companies, we must then decide which ones are subject to taxation.[16]

In the context of a use tax, we find it significant that Denver elected to use "nonresident" rather than "nonresident person" or "nonresident individual." Because Denver failed to

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15 This construction of D.R.M.C. § 53-97(9) thereby comports with the longstanding interpretation of the Manager of Revenue and affords due deference to that interpretation. *See City and County of Denver v. Industrial Comm'n*, 690 P.2d 199, 203 (Colo.1984) (noting that this court gives deference to the construction of a statute by administrative officials charged with its enforcement); *Schlagel v. Hoelsken*, 162 Colo. 142, 147, 425 P.2d 39, 42 (1967) ("[I]n interpreting [a] statute we must look to the long-continuing contemporaneous construction of the act by the ... public officials charged with its administration.").

16 Some states specifically define the term "nonresident" so to avoid any confusion. *See* N.J.Rev.Stat.§ 54:32B-11(2). The D.R.M.C. does not offer such guidance.

include modifying terms, it must have intended the term to include some businesses. Colorado case law buttresses this conclusion. In *Rocky Mountain Prestress, Inc. v. Johnson*, a use tax case, this court interpreted the clause, "for his own use," contained in a previous version of section 53-97(9). 194 Colo. 560, 565, 574 P.2d 88, 91-92 (1978). Had Denver interpreted "nonresident" to apply only to natural persons, *Rocky Mountain Prestress* would not have turned on the phrase, "for his own use," because the exemption would have be inapplicable to companies. As a result, companies may be "nonresidents" for purposes of the use tax.

Many courts indicate that a corporation is a resident only of the state where incorporated. *See International Serv. Ins. Co. v. Ross*, 169 Colo. 451, 457 P.2d 917 (1969) (applying the above rule in denying a motion for change of venue, but placing some weight on the out-of-state location of the company's home office); *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 P. 899 (1911); 36 Am.Jur.2d *Foreign Corporations* § 37 (1968). The Supreme Court of Rhode Island addressed a similar use of "nonresident" in *Great Lakes Dredge & Dock Co. v. Norberg*, 117 R.I. 600, 369 A.2d 1101 (1977). The Rhode Island use tax exemption exempted "'[p]roperty purchased by the user while a *non-resident* of [Rhode Island], and brought into the state by him for his own use.'" *See id.* at 1105 (quoting R.I. Gen. Laws § 44-18-36 (1970)) (emphasis added). Stating that the definition of "residence" for purposes of service of process, venue, or federal diversity is not applicable to the use tax context, the Rhode Island court interpreted "nonresident" to "imply an absence of significant contacts and a lack of consistent operation in th[e] state." *Great Lakes*, 369 A.2d at 1107 (finding that a corporation qualified to do business in Rhode Island which conducted business there for several years was not within the intended meaning of the term "nonresident"

as used in the exemption). We agree with that definition of "nonresident."

"'[R]esident' has many meanings in law, largely determined by the statutory context in which it is used." *Black's Law Dictionary* 1309 (6th ed.1990). States developed use taxes to protect state sales tax revenues, and to protect local merchants from loss of business to other states. *See* 2 Hellerstein & Hellerstein ¶ 16.01.

If "nonresident" is literally construed to refer only to companies incorporated here, the result is absurd. Only those companies incorporated in Colorado[17] would be precluded from utilizing the exemption regardless of their actual operating locales. On the other hand, all other businesses would meet the nonresident requirement regardless of the extent of their Denver business operations. Such a result makes little sense. Denver surely intended to tax those businesses that have substantial activity in the city. The law must be tied to some degree of Denver activity, and the place of incorporation seems to be of little significance. As the Denver code employs the term "nonresident" in section 53-97(9), GM's Denver operations clearly fail the nonresidency requirement. Therefore, GM does not qualify for the exemption.

Although the above examination eliminates GM's ability to seek refuge in section 53-97(9), we further address and clarify our previous interpretation of "personal use." We considered the definition of personal use in *Rocky Mountain Prestress, Inc. v. Johnson*, 194 Colo. 560, 574 P.2d 88 (1978).

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[17] Companies incorporate in states, not cities or counties, further demonstrating that "nonresident" must apply to something other than domicile.

In that case, Rocky Mountain Prestress (RMP), a construction company, brought mobile cranes into Denver for its own use in the construction of buildings. *See id.* at 564, 574 P.2d at 91. Denver attempted to impose its use tax upon the value of the crane services, and RMP argued that it was exempt under the temporary use exemption.[18] *See id.* at 564-65, 574 P.2d at 91. We held that Denver could not tax the value of the crane services under the use tax, but rather could tax only the retail value of the cranes. *See id.* at 565, 574 P.2d at 92. More importantly for purposes of this case, we held that the temporary use exemption was inapplicable to the facts of that case:

> When the purposes to be accomplished by the enactment of a use tax are considered, it is clear that "for his own use" must be construed to mean "for his personal use." If this were not the case, the exemption would frustrate an essential purpose of the use tax, the recoupment of lost sales tax revenue. Since the use of the cranes in fulfillment of a construction contract cannot be considered to be a personal use, the use tax applies.

Id. at 565, 574 P.2d at 91-92. Hence, a business may not claim the personal use exemption if the use furthers the fulfillment of a business purpose.

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[18] When we decided *Rocky Mountain Prestress*, D.R.M.C. § 53-97(9) did not include "personal." Denver added the term later–presumably to conform with our interpretation. The amendment supports the interpretation of the Manager of Revenue that "personal use" excludes "business uses."

We conclude that the nature of the use, rather than length of use, is dispositive on the issue of whether a use is personal. In the context of *Rocky Mountain Prestress*, the fact that the taxpayer used its property directly in a construction contract supported the notion that its use was for business purposes, not personal use. Here, GM used over one-thousand automobiles per year in an enterprise that was clearly commercial: to develop new automobile models that GM could sell to future customers. Accordingly, we hold that GM was not entitled to the exemption contained in D.R.M.C. § 53- 97(9) because it was not a nonresident and its use was not personal.

B.

The second exemption that GM contends is applicable to its use of the automobiles in Denver is the registered vehicle exemption in D.R.M.C. § 53- 97(12). That exemption excludes from taxation "[s]ales of automotive vehicles[19] as defined in this article that are registered and required by state law to be registered outside the city." *Id.*

The code defines "sales", in part, as follows:

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[19] The code defines automotive vehicle as: any vehicle or device in, upon or by which any person or property is or may be transported or drawn upon a public highway, or any device used or designed for aviation or flight in the air. Automotive vehicle includes, but is not limited to, motor vehicles, trailers, semi-trailers or mobile homes. Automotive vehicle shall not include devices moved by human power.

D.R.M.C. § 53-95(1) (1993).

> *Sale*...includes installment and credit purchases and sales and the *exchange of property or services that are taxable under the terms of this article* as well as the purchase and sale thereof for money; and every transaction conditional or otherwise, based upon consideration constitutes a sale.

D.R.M.C. § 53-95(21) (emphasis added).

GM contends that this court should impute a sale of vehicles to have occurred when GM removed the vehicles from its inventory and used them for its own purposes, and that it should therefore fall within the "sale of automotive vehicle" language of the D.R.M.C. § 53-97(12) exemption. Such an approach, however, would be inconsistent with ourholding in *International Business Machines Corp. v. Charnes*, 198 Colo. 374, 601 P.2d 622 (1979). In that case, we held that a previously applicable use tax exemption for wholesale purchases of parts and materials was no longer available when the company removed the items from inventory for its own use. *See id.* at 378-79, 601 P.2d at 625. Thus, we did not "impute" a subsequent sale of parts and materials, but simply recharacterized the original sale.

As such, the relevant sale for purposes of use tax analysis is GM's original purchase of parts and materials—a transaction that is not a "sale[ ] of [an] automotive vehicle[ ]." § 53-97(12); *see also Rocky Mountain Prestress*, 194 Colo. at 563-64, 574 P.2d at 90-91 (discussing when a "fictional purchase at retail" might be appropriate for purposes of the Denver use tax).

The Manager of Revenue ruled that GM was not entitled to this exemption, because: (1) the assessment at issue in this case was not for GM's purchase of automotive vehicles, but rather was for its purchase of parts and materials; and (2) GM failed to introduce evidence establishing that another jurisdiction required GM's vehicles to be registered outside of Denver. The district court affirmed this ruling, holding that:

> The Denver tax is imposed on the component parts of the vehicles, not the value of the vehicle. This is not simply form over substance. The value of the "vehicles," after all parts and labor are combined, is much higher than the component parts before the vehicle is assembled.
>
> The exemption is not applicable to the present situation.

Given the strong presumption against the application of exemptions and the fact that the burden of proof rests on the taxpayer to establish its right to an exemption—a burden that GM failed to carry here—we conclude that the Manager of Revenue and the district court correctly denied GM the benefit of the D.R.M.C. § 53-97(12) exemption.

V.

We conclude that Denver's assessment of its use tax upon GM was both constitutional and authorized by ordinance if Denver applies the appropriate sales and use tax credit to its tax assessment. We turn then to GM's final contention: that the Manager of Revenue should have waived GM's 10% late payment penalty because GM reasonably and in good faith

believed that the vehicles at issue were not subject to the City's use tax. In support of this position, GM cites the court of appeals' recent decision in *United Air Lines*, 973 P.2d at 655 ("If the hearing officer determined that the imposition of penalties was mandatory, she erred in not considering whether the airlines have shown good cause to warrant waiver of such penalties."). The Manager of Revenue upheld the penalty, and the district court did not address the issue.

D.R.M.C.§ 53-114(a) authorizes the Manager of Revenue to impose a 10% penalty on taxpayers who fail to report and pay their tax liabilities in a timely fashion. That provision states: "In any case in which a taxpayer fails to file a return or pay over the tax within the time required by this article, but without the intent to defraud, there shall be added as a penalty ten (10) percent of the total amount of the deficiency ...." § 53-114(a). The ordinance clearly contemplates that a penalty may be assessed even in cases where the taxpayer has no intent to defraud. *See id.*; *see also Western Elec. Co. v. Weed*, 185 Colo. 340, 355, 524 P.2d 1369, 1376-77 (1974) (determining the application of a similar tax penalty provision. "Appellants argue that the statute was not intended to ... penalize a taxpayer who has a good faith dispute on a legal question. The statute, however, in plain and clear language, imposes the penalty upon an intentional but non- fraudulent avoidance of the tax."). Perhaps to mitigate the potentially harsh effect of this section, D.R.M.C.§ 53-133 (1993) authorizes the Manager of Revenue to waive the tax penalty "for good cause shown." *See id.* Here, the circumstances become even more complex because we have concluded that Denver's past interpretation of the credit mechanism was unconstitutional.

The district court failed to reach the penalty issue because it found Denver's use tax wholly unconstitutional. Ordinarily the district court first evaluates the imposition of a penalty by the Manager of Revenue. In light of our decision here, we remand the case to the district court for its findings and conclusions on the penalty issue.

VI.

We affirm the district court's ruling that GM was not entitled to the D.R.M.C.§ 53-97(12) registered vehicle exemption, but reverse the district court's holding concerning the constitutionality of Denver's use tax assessment and the applicability of the D.R.M.C. § 53-97(9) temporary personal use exemption. We remand this case to the district court for determination of the appropriate credit in accordance with the principles we set forth today and for a decision concerning imposition of any penalty.

Justice SCOTT does not participate.

UNITED AIR LINES, INC., a Delaware corporation;
and Air Wisconsin, Inc., a Wisconsin corporation,
Plaintiffs-Appellants,
v.
CITY AND COUNTY OF DENVER,
a home rule city and a Colorado municipal corporation,
Defendant-Appellee.

No. 97CA0151.

Colorado Court of Appeals,
Div. II.

April 30, 1998.

As Modified on Denial of Rehearing
June 25, 1998.

Certiorari Granted March 29, 1999.

Skadden, Arps, Slate, Meagher & Flom, L.L.P., Pamela F. Olson, Washington, D.C., for Plaintiffs-Appellants,

Brownstein, Hyatt, Farber & Strickland, P.C., Hubert A. Farbes, Jr., Lynne M. Hufnagel, Denver, for Plaintiffs-Appellants.

Daniel E. Muse, City Attorney, Maria Kayser, Assistant City Attorney, Office of the City Attorney, Denver, for Defendant-Appellee.

Opinion by Judge TAUBMAN.

Plaintiffs, United Air Lines, Inc., and Air Wisconsin d/b/a United Express (collectively the airlines), appeal the judgment in favor of defendant, City and County of Denver, upholding the constitutionality of the Denver use tax as applied to the airlines, and the subsequent assessment of penalties imposed pursuant to Denver Revised Municipal Code (Denver Code) § 53-114(a). We disagree with the airlines' contention that the ordinance as applied violated their rights under the Commerce Clause, but agree that the imposition of penalties must be reversed.

The parties stipulated to the following facts. Denver audited the airlines and assessed a use tax on the storage, use, distribution, and consumption in Denver of rotable aircraft parts, i.e., parts which can be used more than once after rehabilitation and repair. The audit period for United Airlines was from January 1, 1991 through June 30, 1994. Air Wisconsin's audit period was from July 1, 1991 through December 31, 1993. There is no dispute that both airlines stored, used, consumed, or distributed such parts in Denver during the periods in question.

Air Wisconsin conducted operations at Stapleton International Airport for commercial passenger flights between Denver and Aspen, Colorado. Those flights were the only flights conducted out of Denver by Air Wisconsin. During the audit period, Air Wisconsin purchased aircraft parts from suppliers outside of Denver that were either shipped to Denver or installed on aircraft outside of Denver but subsequently removed in Denver. Air Wisconsin paid Denver use tax based upon the total value of aircraft parts shipped into Denver less the value of parts transported or shipped out of Denver. Air Wisconsin received an assessment from the Denver Manager of Revenue based upon the aforementioned audit for unpaid use

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ck because it exempts from the tax all sales

which Denver is otherwise prohibited from taxing under the Constitution of the United States.

In a consolidated appeal pursuant to C.R.C.P. 106(a)(4), the trial court affirmed the decisions of the hearing officer. The trial court, construing all provisions of the use tax together, determined that Denver Code § 53-97(11) exempts from the use tax all sales *and purchases* which Denver is otherwise prohibited from taxing under the Commerce Clause. Under the trial court's construction, the goods of the airlines passing in interstate commerce would be subject to the same tax as intrastate goods. Thus, so construing the ordinance, the trial court found it constitutional.

This appeal followed.

I. Standing and Mootness

At the outset, we address Denver's contention that because neither airline has suffered a cognizable injury, neither has standing to challenge the constitutionality of the use tax ordinance. More specifically, Denver argues that because Air Wisconsin had no potential tax liability to any other jurisdiction regarding the aircraft parts in question, it suffered no legal injury and, therefore, does not have standing to challenge the ordinance. Similarly, Denver argues that because United Airlines received a credit for all other taxes paid on its parts, including taxes paid to the state of California, it likewise does not have a cognizable legal injury.

Although both Denver and the trial court have addressed standing, we presume, based upon their reliance on *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), that the challenge is also

premised upon the doctrine of mootness. We disagree with both contentions.

Contrary to United's separate contention, an appellee may, without filing a notice of cross-appeal, raise arguments in support of a judgment which would not increase his or her rights under the judgment, whether or not the trial court has ruled on those arguments. *City of Delta v. Thompson*, 37 Colo.App. 205, 548 P.2d 1292 (1975).

Similarly, the failure to file a cross-appeal does not preclude review of jurisdiction by an appellate court. *Best v. La Plata Planning Commission*, 701 P.2d 91 (Colo.App.1984). The question of jurisdiction may be raised at any stage of the litigation, including for the first time on appeal. *See 5050 S. Broadway Corp. v. Arapahoe County Board of Commissioners*, 815 P.2d 966 (Colo.App.1991).

Accordingly, we address Denver's contentions concerning standing and mootness.

A. Standing

Denver contends that, because Air Wisconsin has not suffered an injury in fact, review of the constitutionality of the use tax ordinance is precluded. We are not persuaded.

The conventional inquiry on standing is whether a plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. *In re Application for Water Rights of Turkey Canon Ranch Limited Liability Co.*, 937 P.2d 739 (Colo.1997).

Therefore, if a party suffers no injury in fact, or suffers injury in fact but not from the violation of a legal right, no relief can be afforded, and the case should be dismissed for lack of standing. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977).

A complaining party may satisfy the actual injury requirement by demonstrating that the challenged action has caused, or threatens to cause, economic injury. The injury must be direct and palpable. *Hughey v. Jefferson County Board of Commissioners, 921 P.2d 76 (Colo.App.1996).*

Here, it is undisputed that Air Wisconsin had not been taxed in other jurisdictions. However, even though Air Wisconsin had not been subject to multiple taxation under Denver's use tax, it nonetheless was, and continues to be, subject to the penalties and interest assessed against it pursuant to Denver Code § 53-114(a). Such injury is both direct and palpable and, therefore, satisfies the first requirement for standing. Further, because the party who bears the financial burden of a tax is the party aggrieved, the second requirement of standing is also met. *See Hughey v. Jefferson County Board of Commissioners, supra.*

B. Mootness

Denver next contends that United Airlines is precluded from seeking review in this matter because Denver's voluntary decision to credit United Airlines for state and local taxes paid in California has made United Airline's challenge moot. Again, we disagree.

Appellate courts will not generally render opinions on the merits of an appeal when issues presented in the litigation

become moot because of subsequent events. A case is moot when a judgment would have no practical effect upon an existing controversy, or would not put an end to any uncertainty. *Freedom From Religion Foundation, Inc. v. Romer, 921 P.2d 84 (Colo.App.1996).*

However, a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. This is so because there is no certainty that the defendant will not resume the challenged practice once the action is dismissed, thereby effectively defeating the court's intervention in the dispute. *See City of Mesquite v. Aladdin's Castle, Inc., supra.*

Here, United Airlines was taxed by both state and local taxing jurisdictions of California. Because the plain language of Denver Code § 53- 92(c) allows a credit only for sales or use taxes imposed by other municipalities, United Airlines would have been subjected to multiple taxation, absent a credit for state and county taxes. However, Denver "interpreted" its ordinance so as to provide a credit to United Airlines for the amount of taxes paid to both state and local taxing jurisdictions of California. Thus, although Denver's voluntary action effectively eliminated any economic injury from disparate taxation, such voluntary action does not moot United Airlines' challenge.

Denver cannot effectively avoid constitutional inquiry concerning the ordinance through voluntary cessation of challenged conduct. *See City of Mesquite v. Aladdin's Castle, Inc., supra; Byrne v. Title Board,* 907 P.2d 570 (Colo.1995) (appeal from Title Board's refusal to conduct hearing within 48-hour period not rendered moot, even after elector received hearing, because there was no reason to believe that, in the

future, under similar circumstances, elector would be able to obtain review before board within 48 hours).

Further, we note that United Airlines, like Air Wisconsin, suffered economic injury because it was, and continues to be, subject to the penalties and interest assessed against it. Thus, neither lack of standing nor mootness precludes our review.

II. Commerce Clause Challenge to Use Tax

The airlines challenge the trial court's ruling upholding the constitutionality of the use tax. Specifically, they contend that Denver's use tax violates the Commerce Clause because it discriminates unfairly against its rotable aircraft parts which pass in interstate commerce. We do not agree.

At the outset, we note that, in their appellate brief, the airlines maintain that because Denver "has not cross-appealed the District Court's decision that the Denver Use Tax is unconstitutional on its face,. . . this issue is not properly before the Court. . . ." Contrary to the airlines' contention, the trial court did not rule the use tax ordinance unconstitutional on its face. Thus, we address only the constitutionality of the ordinance as applied.

The Commerce Clause, although phrased merely as a grant of authority to Congress to regulate commerce among the several states, contains a negative command forbidding the individual states from discriminating against interstate trade. More specifically, the clause prohibits economic protectionism, i.e., regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition. *New Energy*

Co. v. Limbach, 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).

However, a use tax is valid if it is a compensatory tax designed to compensate a state or municipality for revenue lost when residents purchase out-of-state goods for use within the state. *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988). Thus, a valid compensatory tax may not impose greater tax liability on interstate articles than on intrastate articles. *Associated Industries v. Lohman,* 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994).

A use tax which does not allow a credit for taxes paid to other taxing jurisdictions violates the Commerce Clause because it imposes only a single tax on intrastate purchases, but results in payment of multiple taxes on interstate purchases. *Associated Industries v. Lohman, supra.*

A state tax on interstate commerce, such as Denver's use tax, does not violate the Commerce Clause if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Riverton Produce Co. v. State,* 871 P.2d 1213 (Colo.1994). The airlines' challenge here concerns only steps two and three of this test.

A facially neutral statute may violate the Commerce Clause if the state enforces it in a manner that favors intrastate carriers over interstate carriers. *Amerada Hess Corp. v. Director, Division of Taxation,* 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989); *Riverton Produce Co. v. State, supra.*

When determining the constitutionality of an ordinance, a court is guided by basic rules of statutory construction. First, an ordinance is typically presumed to be constitutional, and the party attacking the ordinance has the burden to establish that the ordinance is unconstitutional beyond a reasonable doubt. *See Denver Publishing Co. v. City of Aurora,* 896 P.2d 306 (Colo.1995). *See also* Gibson, *Beyond a Reasonable Doubt: Colorado's Standard for Reviewing a Statute's Constitutionality,* 23 Colo. Law. 835 (April 1994) (discussing origin of beyond a reasonable doubt standard).

Second, if a challenged ordinance lends itself to alternate constructions, one of which is constitutional, the constitutional interpretation must be adopted. *See People ex rel. City of Arvada v. Nissen,* 650 P.2d 547 (Colo.1982). It is the duty of a court to construe an ordinance so as not to invalidate it. *Hiatt v. Manitou Springs,* 154 Colo. 525, 392 P.2d 282 (1984).

Additionally, a tax ordinance, just like a statute, should be construed to give consistent, harmonious, and sensible effect to all its parts. *See Walgreen Co. v. Charnes,* 819 P.2d 1039 (Colo.1991).

Denver Code § 53-92(c) provides:

> It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provision of this article shall apply to any person who has already paid a retail sales tax or a use tax in respect to the sale of a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of

> the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city, but the tax imposed by this article shall, in such event, be measured by the difference between the amount imposed by this article and the amount previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege or using, storing, distributing or consuming such service of personal property in the city.

Denver Revised Municipal Code § 53-96(1) provides that Denver's use tax is levied on the "purchase price paid or charged upon all sales and purchases" of tangible personal property. However, Denver exempts from the use tax, "[a]ll sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state." Denver Revised Municipal Code § 53-97(11). Thus, on its face, the exemption to the use tax applies only to sales while the tax itself applies to both sales and purchases.

However, the ordinance is subject to two conflicting interpretations. The airlines, based upon the plain language of the ordinance, interpret the use tax to allow a credit only for taxes paid to other municipal corporations and not for taxes paid to other states and non-municipal local governments. The other construction, adopted by the trial court, interprets the use tax provision as a whole to comport with the Commerce

Clause. Specifically, the trial court construed the use tax as exempting from the tax all sales and purchases which are otherwise prohibited from being taxed under the constitution or laws of the United States. In our view, the trial court's interpretation is correct. Such a construction is consistent with the supreme court's mandate in both *Hiatt v. Manitou Springs, supra,* and *People ex rel. City of Arvada v. Nissen, supra.*

Significantly, the ordinance defines the terms, "sale," "purchase," and "sale and purchase" identically. Denver Revised Municipal Code § 53-95(21) provides:

> The term 'sale,' 'purchase,' or 'sale and purchase' includes transactions whereby the acquisition of tangible personal property was effected by (a) the transfer, conditionally or absolutely, of title or possession or both of the tangible personal property; or (b) a lease, hire or rental of, or a grant of a license to use (including royalty agreements) tangible personal property. . . .

Thus, construing these provisions of the ordinance together, Denver Code § 53- 91(11) exempts from taxation all sales and purchases which Denver is otherwise constitutionally prohibited from taxing.

Accordingly, a taxpayer may seek an exemption from the use tax if Denver fails to give full credit for taxes paid in other taxing jurisdictions, including states, counties, and municipalities. Under this construction, the tax liability would be the same on the airlines' rotable aircraft parts as on intrastate purchases. Additionally, since the ordinance provides a credit against the use tax for taxes paid in other states, the use tax is fairly apportioned. *See D.H. Holmes Co. v. McNamara, supra.*

Thus, as applied, the Denver ordinance use tax was fairly apportioned and does not discriminate against interstate commerce. Therefore, the ordinance does not violate the Commerce Clause.

Associated Industries v. Director of Revenue, 918 S.W.2d 780 (Mo.1996), decided on remand from *Associated Industries v. Lohman, supra,* does not persuade us to the contrary. There, Missouri's supreme court struck down an entire use tax ordinance as violative of the Commerce Clause because it imposed an additional 1 1/2% use tax on all transactions subject to it, thereby impermissibly discriminating against interstate commerce. The court rejected the argument that an exemption in the ordinance for, "property, the storage, use, or consumption of which this state is prohibited from taxing under the Constitution.. of the United States," saved the ordinance from otherwise violating the constitution. The court concluded:

> The exemption . . . is defined by 'property,' presumably a certain discernible type of property . . . the Supreme Court's exception to the use tax [in Associated Industries of Missouri v. Lohman] is based not on the inherent nature of the property in question, but rather on local sales tax rates.

Unlike in Associated Industries, here the exemption is not based upon the inherent nature of the property, but rather on how the use tax in general applies to sales, or more specifically, sales and purchases. Thus, in our view, the exemption allows the ordinance to be applied within constitutional bounds unlike the nature of the exemption in *Associated Industries, supra.*

Because this construction permits credit for taxes paid to other taxing jurisdictions apart from municipalities, we need not determine whether Denver's lateral tax credit structure violates the Commerce Clause.

III. Penalties

The airlines also contend that the trial court erred in upholding the penalties assessed pursuant to Denver Revised Municipal Code § 53-114(a) because they have demonstrated good cause as required by the Denver Revised Municipal Code § 53-133. However, the record is ambiguous as to whether the hearing officer concluded that the imposition of penalties was required by Denver Code § 53-114 or whether she exercised her discretion in upholding the assessment of penalties against the airlines.

If the hearing officer determined that the imposition of penalties was mandatory, she erred in not considering whether the airlines have shown good cause to warrant waiver of such penalties. In the alternative, even if we assume arguendo, that the hearing officer did in fact exercise her discretion in upholding the penalties, there are no findings in regard to waiver for good cause, and thus, we must remand the matter for the entry of findings on that issue.

Here, the hearing officer found that, under Denver Code § 53-114(a), the imposition of penalties against the airlines is automatic, the penalties resulted from an audit that revealed taxes were due which were not paid, and Denver Code § 53-133 did not mandate the waiver of penalties.

Under these circumstances, we conclude that the matter must be remanded for factual findings regarding whether good

cause existed to waive the 10% penalty against the airlines. *See Boice v. Industrial Claim Appeals Office,* 800 P.2d 1339 (Colo.App.1990) (where findings of fact and conclusions of law insufficient and it is unclear whether proper legal standard applied, remand for clarification and further findings is necessary). The hearing officer may, in his or her discretion, allow the parties to submit additional evidence concerning the issue.

The judgment is affirmed in all respects except as to the portion thereof upholding the imposition of penalties. That portion of the judgment is reversed, and the cause is remanded for further remand to the hearing officer to resolve the issue concerning
waiver of penalties consistent with this opinion.

Judge CASEBOLT concurs.

Judge BRIGGS specially concurs.

Judge BRIGGS specially concurring.

While I concur in the outcome, I write separately for two reasons. First, I cannot join the opinion without expressing my concerns with a familiar litany: The party challenging a legislative enactment must present proof beyond a reasonable doubt the enactment is unconstitutional. Second, my concurrence is driven, not just by what issues are raised, but also by what is not raised.

I.

When rejecting a constitutional challenge, Colorado appellate opinions typically begin by referencing the supposed requirement of "proof beyond a reasonable doubt." However,

the supreme court has never actually applied the requirement as a basis for rejecting a constitutional challenge. I do not take the reference as literally adding a step to be applied in a proper constitutional analysis. Nor do I believe it should be added and applied, particularly in its present incantation.

When added to an opinion addressing the constitutionality of a legislative enactment, the requirement of proof beyond a reasonable doubt appears innocent enough. However, it subtly mutates the accepted beginning point for a constitutional analysis, creating an additional and final step which, even when taken properly, is treacherous. More importantly, it is a step seldom, if ever, properly taken.

A.

The genesis of the phrase is the familiar observation that a court, when addressing the constitutionality of a legislative enactment, must accord deference to a co-equal and representative branch of government. This but recognizes that the structures of our national, state, and local governments are based on the doctrine of separation of powers. In this system, the courts must recognize the political and administrative responsibilities of the legislature and must not, even negatively, undertake to legislate. *See generally* H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (W. Eskridge & Frickey eds.1994); J. Thayer, *The Origin and Scope of The American Doctrine of Constitutional Law*, 7 Harv. L.Rev. 129 (1893).

A principle long ago derived from this deference is that a legislative enactment is presumed to be constitutional. *See Ogden v. Saunders*, 12 Wheat. 213, 25 U.S. 213, 6 L.Ed. 606 (1827); *People ex rel. Tucker v. Rucker*, 5 Colo. 455 (1880).

This rephrasing of general deference as a derivative presumption merely creates an obvious beginning point for a constitutional analysis: Unless persuaded otherwise, a court will not strike down a legislative enactment as unconstitutional. The presumption retains the necessary sensitivity to the court's task. *See Blodgett v. Holden,* 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927)(resolving a constitutional challenge to a legislative enactment is the gravest and most delicate duty that a court is called on to perform.). At the same time, courts also retain the inherent authority, and duty, to determine independently whether a legislative enactment violates a constitutional right or prohibition. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Pena v. District Court,* 681 P.2d 953 (Colo.1984). Hence, in converting deference into a presumption, nothing untoward has occurred.

B.

The next derivative step, also taken long ago, was to espouse that a legislative enactment must be "proved unconstitutional beyond a reasonable doubt." *See Alexander v. People,* 7 Colo. 155, 2 P. 894, 896 (1884); *see also Ogden v. Saunders, supra.* Despite its benign appearance, the result is to extend necessary deference to an extreme degree, while at the same time creating analytical difficulties.

Typically, with a presumption of constitutionality as a starting point, a court proceeds with its analysis by articulating and applying an appropriate standard of review. For example, in addressing a substantive due process or equal protection challenge, a court must first determine whether the challenged legislative enactment creates a suspect class or affects a fundamental constitutional right. *Lorenz v. State,* 928 P.2d 1274 (Colo.1996). If so, then the court must "strictly scruti-

nize" the challenged provision to determine whether it is narrowly tailored to achieve a compelling governmental interest. If not, then the court need only determine whether the enactment bears a "rational relationship" to a legitimate governmental purpose. *People v. Young,* 859 P.2d 814 (Colo.1993).

The court next applies the appropriate standard of review, such as by striking a proper balance between competing interests. *See Cole v. State,* 673 P.2d 345 (Colo.1983). Finally, having applied the standard of review, the court comes to its conclusion. If it is persuaded the enactment is unconstitutional, the presumption of constitutionality has been overcome.

This would seem to be the end of the analysis. However, by requiring that the court's conclusion be based on "proof beyond a reasonable doubt," a court creates "something more than a mere form of language." *See* J. Thayer, *supra,* 7 Harv. L.Rev. at 143. No longer is it sufficient that the court is persuaded a legislative enactment is unconstitutional. Having otherwise completed its analysis and reached that conclusion, the court must now additionally determine whether it is convinced of its decision by a degree of certainty, or firmness of conviction, that is "beyond a reasonable doubt." It is this additional step that raises several concerns.

C.

Requiring a court to be persuaded that a legislative enactment is unconstitutional "beyond a reasonable doubt" is an extreme degree of deference, one that itself is not, and has never been, free of doubt. Among the concerns raised by such a degree of deference is its failure to recognize that members of a legislative branch may vote for a law because it is politically

expedient to do so, even though they doubt or at least question the enactment's constitutionality. Further, requiring such an extreme degree of certainty is not without impact on the constitutional rights of citizens. *See generally* G. Lawson & C. Moore, *The Executive Power of Constitutional Interpretation,* 81 Iowa L.Rev. 1267 (1995-96); J. Thayer, *supra.*

In addition, the requirement places a heavier burden of persuasion on citizens in our state courts than on those in our federal courts. When the identical challenge is raised under our federal constitution in state and federal courts, it is not clear why the burden of persuasion should vary.

The requirement of proof beyond a reasonable doubt has never provided the expressed basis for striking down a legislative enactment in any of our state's appellate opinions. The very fact that many decisions upholding legislative enactments have been far from unanimous arguably indicates that our courts often have not actually deferred to such an extreme degree. Indeed, it would be surprising to see any appellate court that was firmly convinced a legislative enactment was unconstitutional nevertheless conclude the statute must be upheld because the majority was not convinced "beyond a reasonable doubt."

D.

Apart from the questionable wisdom in theory of adding "proof beyond a reasonable doubt" as an additional and final step in a constitutional analysis, the more serious concern comes in practice. The requirement has simply not been properly applied. The three most common misapplications are: 1) misstating what should be, at best, a heightened burden of persuasion as an evidentiary burden of proof; 2) merging what

should be, at best, the last step in a constitutional analysis into an earlier step; or 3) espousing the litany, but then never applying it.

1.

It is typical to state both that a legislative enactment is presumed to be constitutional and that the burden of "proof" is "beyond a reasonable doubt." This resembles nothing so much as the presumption of innocence and burden of proof involved in a criminal case--an evidentiary burden of proof.

The purpose of a constitutional analysis is of course not to make factual findings. Some underlying factual disputes may have to be resolved. However, no heightened standard of proof applies, and the ultimate purpose is still the resolution of a constitutional challenge through legal analysis.

Even when the challenge is to the constitutionality of a legislative enactment as applied, the "evidence" required for the legal analysis is often undisputed, consisting of no more than the legislative enactment, a factual context, and perhaps some uncontested legislative history. The "evidence" may even take the form of mere rational speculation. *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211, 222 (1993)("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). When the challenge is that a legislative enactment is facially overbroad, the underlying facts may become even less important. *See People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo.1985).

Nevertheless, because of the striking similarities, the two unrelated analyses, one legal and one factual, are easily confused. The unfortunate result can be a misdirected focus in a constitutional analysis on the "evidence" presented, thus improperly implying that a question of fact controls and must be resolved. *See generally* L. Gibson, *Beyond A Reasonable Doubt: Colorado's Standard For Reviewing A Statute's Constitutionality,* 23 Colo. Law. 835 (April 1994)("Colorado courts do not find statutes unconstitutional absent *evidence* beyond a reasonable doubt." (emphasis added)).

To the contrary, the court's ultimate degree of certainty, or firmness of conviction, in a conclusion resolving a constitutional challenge does not result from the evidence, or "proof," presented. It results from the force, or persuasiveness, of legal argument.

2.

The confusion does not end there. It is not unusual to see this supposedly final analytical step in a constitutional analysis instead merged into the earlier steps of selecting and applying an appropriate standard of review, such as "rational relationship" or "strict scrutiny."

When this happens, no longer does the lesser standard of "rational relationship" merely require that a legislative enactment be upheld so long as the governmental classification is based on differences that are real and not illusory and is rationally related to a legitimate governmental interest. Under the merged "rational relationship" test, the challenging party must also "prove" the enactment unconstitutional "beyond a reasonable doubt." *Colorado Auto Auction Services Corp. v. City of Commerce City,* 800 P.2d 998, 1004 (Colo.1990).

Conversely, if the classification affects a fundamental right or suspect class, under the merged test the consequence is not just to subject the enactment to "strict scrutiny" in order to determine if it is narrowly tailored to achieve a compelling governmental interest. In addition, the "burden of proof" shifts to the government, not just to come forward with justification for the enactment, but also to prove the constitutionality of the enactment-- albeit by some unarticulated degree of certainty apparently less than "beyond a reasonable doubt." *See Rickstrew v. People*, 822 P.2d 505 (Colo.1991); *see also Denver Publishing Co. v. City of Aurora*, 896 P.2d 306 (Colo.1995).

What is of interest in this merging of separate analytical steps is that the deference to which a co-equal branch of government is entitled appears and disappears, case by case, depending on the nature of the constitutional right or classification asserted. While it may be appropriate to vary the standard of review in a constitutional analysis on such bases, it is unclear why the respect and sensitivity to which each branch of government is entitled should be anything less than invariable.

3.

The final, and most common, use of the litany is simply to state at the outset of the legal analysis that a challenge to the constitutionality of a legislative enactment requires proof beyond a reasonable doubt. The supposed requirement is then never mentioned again.

Its purpose is never explained. Because the supposed constitutional principle is typically recited and ignored in opinions in which the challenged legislative enactment is upheld, it appears as no more than a thinly-veiled rationaliza-

tion. Whatever the purpose, its use in this manner neither adds to nor clarifies a constitutional analysis.

E.

I recognize the United States Supreme Court first formulated the incantation. Context, however, is critical. It was not until *Marbury v. Madison, supra,* that the Court had even addressed the issue of judicial authority to review the constitutionality of legislative declarations. The decision in Marbury hardly quieted the debate. *See generally* J. Thayer, *supra.*

It is thus not surprising that an extremely sensitive and cautious Supreme Court, in *Ogden v. Saunders, supra,* 25 U.S. at 270, found it politically astute to add an additional observation: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond a reasonable doubt."

However, it is likewise not surprising that the United States Supreme Court has not uttered the phrase as part of a constitutional analysis in more than half a century. *See Adkins v. Children's Hospital,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923). In its place, the Supreme Court has returned to a simple expression of deference. *See Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985).

F.

The parties have raised no issue concerning the framework for analyzing the constitutional issue before us. Repeating the litany of "proof beyond a reasonable doubt" has not impacted the result we reach in this case. As already noted, it has not impacted the result in any published case--thus far.

I nevertheless write separately because it is, after all, a constitutional principle we are supposedly espousing. It has impact on the perception of our state's appellate courts:

> [Appellate opinions] serve to uphold the moral power of the courts, without which the judiciary would be ineffectual. . . . [T]he prestige of the judiciary . . . is related to the quality of the opinions of the courts as statements of reasoning. When the reasoning of an opinion fails adequately to support the decision in a case, it is the entire judicial process that suffers.
>
> ....
>
> One of the most intense . . . controversies in recent American jurisprudence has centered precisely on the point of adequate judicial reasoning in reaching decisions. . . . The reasons of decision become constitutional principles, and as principles they acquire a force of their own. . . . [T]hey stand around 'like a loaded weapon' waiting to be fired when the constitutional occasion arises.

C. Miller, *The Supreme Court and the Uses of History,* pp. 11-14 (1969); *see also* R. Aldisert, *The Judicial Process* Ch.

3, § 4 (1976)(discussing the role of judicial rules and principles).

What is important in the final analysis, constitutional or otherwise, is that appellate courts articulate principles and standards that are needed and useful. It is debatable whether requiring any heightened degree of deference is either. *Cf. Walters v. National Ass'n of Radiation Survivors, supra.* Even if both, requiring that a constitutional challenge rest on "proof beyond a reasonable doubt" is neither.

II.

United asserts a violation only of the Commerce Clause. It does not, for example, assert that the Denver Municipal Code, so interpreted, violates due process by failing to give fair advance notice of just what activities and properties are subject to taxation. Hence, our review is limited to the single issue raised on appeal.

In construing Denver's taxing scheme not to violate the Commerce Clause, the majority relies on the exemption from sales and use taxes set forth in Denver Revised Municipal Code § 53-91(11). It exempts "[a]ll sales which the city is prohibited from taxing under the constitution or laws of the United States or the Constitution of the state." The majority construes this to exempt from taxation all sales and purchases that Denver is otherwise constitutionally prohibited from taxing.

Like the majority, I am persuaded (although perhaps not beyond a reasonable doubt) that this construction reflects Denver's intent. So construed, the exemption necessarily defeats any constitutional challenge to any tax on any sale or any purchase. If a court determines a particular application of § 53-96(1) would otherwise violate the Commerce Clause,

under § 53-97(11) it must construe § 53-96(1) to exclude that application. It thus becomes a tautology to say that the tax imposed under the Denver Municipal Code does not violate the Commerce Clause.

Therefore, in light of the limited issue before us, I concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 96 CV 1195, Courtroom 11

UNITED AIR LINES, INC., a Delaware corporation authorized to transact business in the State of Colorado; and
AIR WISCONSIN, INC., a Wisconsin corporation authorized to transact business in the State of Colorado,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER, a home rule City and a Colorado municipal corporation,

Defendant.

THE COURT, having considered plaintiffs' opening brief, defendant's response, the reply, the record of the proceedings below, the court file and relevant authorities, and being sufficiently advised in the premises, finds, concludes and orders as follows:

1. Pursuant to C.R.C.P. 106(a)(4) each plaintiff appeals the Final Decision of hearing officer Tami A. Tanoue dated February 10, 1996 upholding the application of the City and County of Denver ("Denver") use tax to plaintiffs' operations during periods between 1991 and 1994. Plaintiffs contend here, as they did at the administrative level, that the application of the Denver use tax to their operations violates

the commerce clause of the United States Constitution on its face and as applied. The Court rejects that contention and affirms the decisions of the hearing officer.

2. The material facts are not in dispute and are set forth in the Stipulation of Fact attached to the hearing officer's decision in each case. They will be alluded to as necessary to resolve the issues presented.

3. At all material times Denver had adopted both a sales tax and a use tax. The sales tax, Denver Revised Municipal Code ("Code") § 53-25, applies to taxable goods and services purchased at retail within Denver. The Denver use tax, Code §§ 53-91 through 138, applies to taxable goods and services previously purchased (or purchased and used) outside of Denver, but which are brought into Denver for storage, use, distribution or consumption. The use tax is complementary to the sales tax. That is, it is designed to compensate Denver for lost sales taxes when items of tangible personal property are purchased elsewhere and are then brought into Denver for use. The sales tax and the use tax are each 3.5%.

Code § 53-92(c) provides the taxpayer is entitled to a credit against the use tax, up to the full amount of the use tax, for sales and use taxes already paid to a municipal corporation of another state. Code §53-97(11) provides an exemption from the use tax for: "All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state."

4. At all material times the State of Colorado has had a similar retail sales tax and use tax scheme. The Colorado sales and use taxes are each 3%. See C.R.S. §39-26-106 and §39-26-202 respectively. Colorado also grants a credit up to

the full amount of the 3% use tax for sales and use taxes which have previously been paid to another state on the same article of tangible personal property. See §39-26-203(1)(k).

5. Plaintiffs' primary contention here, as at the administrative level, is that the Denver use tax, which plaintiff's correctly contend must be considered in the context of the state tax scheme described above, see Associated Industries of Missouri v. Lohman, 511 U.S. ___,128 L.Ed.2d 639 (1994), violates the commerce clause of the United States Constitution because it fails to give the taxpayer credit against the use tax for all state and local taxes previously paid on the same article of property. Consequently, plaintiffs contend, the Denver use tax places a greater tax burden on interstate purchases than on local purchases in violation of the commerce clause.

6. In determining whether local sales and use taxes violate the commerce clause, the United States Supreme Court has applied a four-part test first articulated in Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977). The test requires that the tax: (1) be applied to an activity with sufficient nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. The prong at issue here is the apportionment prong.

7. In determining whether a tax is fairly apportioned the United States Supreme Court requires inter alia that it be "internally consistent." See Goldberg v. Sweet, 488 U.S. 252, 261 (1989). A tax is internally consistent if it is so structured that if every state were to impose the same tax, no multiple taxation would result. Id.

8. Although the internal consistency test has been frequently applied by the United States Supreme Court there has been some division within the Court as to what it requires and whether it should be applied at all. See generally, Hellerstein, 'Internal Consistency' Foolish? Reflections on a Commerce Clause Restraint on State Taxation, 87 Mich. L.Rev. 138 (1988). It is reasonably clear, however, that a use tax which does not give adequate credit for other state and local taxes paid on the same article fails the test. Barringer v. Griffes, 1 F.3d 1331, 1336-7 (2d Cir. 1993); see also Hellerstein. supra. at 159-162; Multistate Tax Compact (of which Colorado is a member, granting full credit against use tax for state and local taxes paid in another state); cf., D.H. Holmes Co. v. McNamara, 100 L.Ed.2d 21, 28 (1988) (use tax is fairly apportioned when it credits tax paid in other states). The reason is fairly straightforward: a state or local use tax which does not give such credit violates the commerce clause because it imposes only a single tax on an intrastate purchase, but multiple taxes on an interstate purchase of the same article.

9. Although no authority dealing directly with lateral credits has been presented, applying the general principles above the Court disagrees with Denver that lateral credits att he state and local level avoid the multiple taxation problem. First, there is nothing in the stipulated facts to suggest that the Colorado state tax credit applies in all instances where the Denver use tax is imposed. In fact, Denver's voluntarily crediting United Air Lines ("UAL") with taxes paid to the state of California suggests to the contrary. In addition, the lateral credit scheme would not effect full credit for state and local taxes paid where, for example, another state's combined sales and use tax rates exceeded the Denver use tax rate of 3.5%, and the other state's combined local tax rate was less than the Colorado use tax rate of 3%. In such case, even if lateral

credits were given, the interstate purchaser would pay a greater tax than the local purchaser of the same article because the lateral credits would not be sufficient to fully offset the combined Colorado and Denver use tax.

10. The Court rejects Denver's contention that the plaintiffs lack standing to assert a commerce clause challenge because they have not been subject to actual multiple taxation. Where, as here, the taxing scheme creates a substantial risk of multiple taxation depending upon the tax schemes in 49 other states, its constitutionality should not depend upon the shifting complexities of the tax codes of those other states. See Armco, Inc. v. Hardesty, 467 U.S. 638, 81 L.Ed.2d 540 (1984). That reasonable expectation of a commerce cause violation presented by the Denver use tax is sufficient to support a challenge. See City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982).

11. In summary, the Court concludes that absent some provision in the Code to permit application of the Denver use tax in a constitutional manner, that tax violates the commerce clause of the United States Constitution.

12. In her Final Decision in the UAL case the hearing officer concluded that even assuming the system of lateral credits was not sufficient to meet the internal inconsistency test, Code §53-97(11) saves the use tax from a challenge under the commerce clause because it exempts from the use tax all sales which Denver is prohibited from taxing under the constitution of the United States. (Final Decision at ¶11.) The Court agrees and rejects plaintiffs' contention that §53-97(11) applies only to types of sales, or the kinds of goods and services which can be taxed in Denver and has nothing to do with credits.

13. In construing an ordinance the Court should adopt a construction which renders the ordinance constitutional without doing violence to the fair meaning of the language. See Dominguez v. Denver, 147 Colo. 233, 238 (Colo. 1981). While §53-97(11) does not expressly provide full credit for sale and use taxes previously paid, the Court concludes that construing that provision in the context of the use tax article as a whole, §53-97(11) permits that result. The use tax is levied only: "upon the purchase price paid or charged upon all sales and purchases of tangible personal property." Section 53-96(I). (Emphasis added.) "Sale and purchase" has the same definition as "sale." Section 53-95(21). Code §53-97(ii) exempts from the use tax: "all sales [sales and purchases] which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state." (Emphasis added.) The Court construes "sales" in § 53-97(11) to include the original "sale and purchase" of the tangible personal property which triggers the levying of the use tax under §59-96(1). This construction permits the taxpayer to go through the fairly simple procedure of seeking an exemption from the use tax where that tax has failed to give full credit for taxes paid in other states.

14. To the extent that plaintiffs' argument that the Denver use tax violates the principle of lateral credits because of Denver's dual capacity as a city and county is not resolved by the above ruling, the Court rejects it as being without merit. There is no evidence that Denver was ever legally authorized to impose a use tax as a county.

15. The Court rejects UAL's argument that a sufficient nexus does not exist between Denver and the use of UAL parts in Denver to justify imposition of the use tax on

those parts. There is insufficient evidence in the record for the hearing officer to have made such a determination.

16. UAL contends that the hearing officer erred in rejecting its request for waiver of the 10% penalty because, UAL contends, it had good cause for its tax return positions. The Court disagrees. Section 53-114 of the Code provides for a 10% penalty for failure to pay the use tax when due. Section 53-133 gives the Manager of Revenue discretion to waive the penalty for "good cause shown." There is, however, no evidence in the record of any factual showing of good cause before the manager to support UAL's claim that it is entitled to a waiver of the penalty. Thus, there was no record upon which the hearing officer could determine whether the manager abused her discretion. Under the Code, waiver is not an issue that either the hearing officer or the Court decides de novo.

17. The Final Decision of the hearing officer as to each plaintiff is affirmed.

Dated this 12 day of December, 1996.

BY THE COURT:

_____

John N. McMullen
District Court Judge

cc: All parties.

BEFORE THE MANAGER OF REVENUE
OF THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

In re:

United Air Lines, Inc., Petitioner
Account No. 2518(5)
Case No. 951007

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION AND ORDER

A. Introduction.

1. This matter comes before the Manager of Revenue of the City and County of Denver, State of Colorado, acting by the undersigned duly appointed hearing officer pursuant to the Denver Revised Municipal Code and the Rules Governing Hearings Before the Manager of Revenue.

2. The matter is a petition for review dated October 23, 1995 of an assessment dated October 6, 1995 of use taxes, penalties, and interest against the Petitioner, United Air Lines, Inc. As pertinent here, the assessment pertains to United's purchase of aircraft parts, including parts which can be used more than once after rehabilitation and repair.

3. The hearing was originally scheduled for December 18, 1995, but was continued to April 1, 1996 at

United's request. United was represented at the hearing by Pamela F. Olson, Skadden, Arps, Slate, Meagher & Flom, and Hubert A. Farbes, Jr., Brownstein Hyatt Farber & Strickland, P.C.; Denver was represented at the hearing by Maria Kayser, Denver Assistant City Attorney.

4. No factual evidence was presented at the hearing. The parties presented a document entitled "Stipulation of Fact." A copy of the Stipulation is attached hereto as Appendix A. During the hearing, the parties amended Paragraph 5 of the Stipulation to clarify that the Manager of Revenue has actually credited the Petitioner for sales or use taxes paid to both state and local taxing jurisdictions in California. Each party also presented a brief concerning the matter.

5. At the hearing, Denver amended its assessment as provided in Exhibit 1, a copy of which is attached hereto. The amendment reflects the credit referred to above.

B. <u>Issues raised by United</u>.

1. At the hearing, or in its brief, United raised the following issues concerning the assessment:

a. The D.R.M.C.'s use tax provisions, on their face, violate the Commerce Clause of the United States Constitution because of the failure to provide for a credit against other states' sales and use taxes paid by United; and

b. Denver should waive penalties under D.R.M.C. § 53-133.

2. Denver responded that:

a. United lacks standing to raise the constitutional issue because Denver has credited United for the taxes paid by United to other state and local governments; and

b. The D.R.M.C.'s use tax provisions are constitutional.

C. Burden of proof.

1. D.R.M.C. § 53-117(e) provides that the burden of proof with regard to a petition for revision, modification, or cancellation of an assessment is on the taxpayer. Thus, under the D.R.M.C., the assessment is presumed to be correct and the burden is on United to overcome that presumption.

2. In addition, United's challenge is to the facial constitutionality of the D.R.M.C.'s use tax provisions. An ordinance is presumed constitutional. People v. Nissen, 650 P.2d 547 (Colo. 1982). The burden is upon the party attacking the ordinance to establish its unconstitutionality beyond a reasonable doubt. Id. If the ordinance lends itself to alternate constructions, one of which is constitutional, that construction must be adopted. Id.

3. Parties are not required to raise the issue of the facial constitutionality of an ordinance in an administrative forum, because the hearing officer's decision on such an issue will not be considered authoritative. Denver Ctr. for the Performing Arts v. Briggs, 696 P.2d 299, 305-306, n. 5 (Colo. 1985). However, where such an issue is raised, the hearing officer may consider it, and the hearing officer's decision may be reviewed on appeal. Id.

D. Standing.

1. Standing requires an inquiry into whether the ordinance provision on which a claim rests "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Friends of Chamber Music v. City and County of Denver, 696 P.3d 309, 315 (Colo. 1985).

2. Resolution of standing requires a determination whether the plaintiff has suffered an actual injury from the challenged governmental action; and if so, whether the injury is to a legally protected or cognizable interest. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535, 539 (Colo. 1977).

3. In this case, the injury claimed by United is the failure of the D.R.M.C. to give credit for state sales or use taxes paid by United. However, it is undisputed that Denver has given credit to United for both state and local taxes previously paid by United. Thus, if it is assumed the D.R.M.C. contains an infirmity in this regard, Denver has corrected the infirmity by granting United the very relief it seeks. Thus, United has suffered no actual injury and lacks standing to challenge the constitutionality of the D.R.M.C.

E. Applicable D.R.M.C. provisions.

1. D.R.M.C. § 53-96 states:

> There is levied and there shall be collected and paid a tax in the amount stated in this article, by every person exercising the taxable privilege of storing, using, distributing, or consuming in the city . . . any article of tangible per-

> sonal property, purchased at retail, for said exercise of said privilege, as follows:
>
> (1) On the purchase price paid or charged upon all sales and purchases of tangible personal property.

2. The use tax is, in essence, a sales tax which is collected directly from the purchaser, rather than through the vendor, where the purchaser stores, uses, distributes, or consumes the subject property in Denver. Under D.R.M.C. § 53-27 and § 53-98, the tax rate is the same whether it is collected as a sales tax or a use tax.

3. With regard to credits for prior sales or use taxes paid, D.R.M.C. § 53-92(c) provides:

> It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provisions of this article shall apply to any person who has already paid a retail sales tax or a use tax in respect to the sale of a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or a tangible personal property, taxable hereunder, to be used, stores, distributed or consumed in the city, but the tax imposed by this article shall, in such event, be measured by the difference between the amount imposed by this article and the amount

> previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege or using, storing, distributing or consuming such service of personal property in the city.

4. Pursuant to D.R.M.C. § 53-92(c), Denver gives credit against its use tax for sales or use taxes previously paid by a taxpayer to another municipality.

5. In addition, D.R.M.C. § 53-97(11) grants a use tax exemption for:

> All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state.

6. With regard to penalties, D.R.M.C. § 53-114(a) provides:

> In any case in which a taxpayer fails to file a return or pay over the tax within the time required by this article, but without the intent to defraud, there shall be added as a penalty, ten (10) percent of the total amount of the deficiency, but not less than ten dollars ($10.00) . . . .

7. D.R.M.C. § 53-133 permits (but does not require) the Manager to waive a penalty for good cause.

F. Propriety of assessment.

1. Under the foregoing D.R.M.C. provisions, Denver's assessment was proper. United purchased the aircraft parts and stored, used, distributed, or consumed the parts in Denver. The purchases were not for resale and thus were at retail. The assessment was calculated with a credit for any prior payment by United of state or local sales or use taxes on the purchases.

G. Facial validity of D.R.M.C.'s use tax provisions.

1. United argued that the D.R.M.C.'s use tax provisions are facially invalid under the Commerce Clause because of the failure to provide a credit for sales and use taxes paid to other states; specifically, United argued that the use tax provisions fail the "internal consistency test" and thus are unfairly apportioned and discriminatory. However, United has not met its burden of providing such invalidity beyond a reasonable doubt.

2. In Complete Auto Transit v. Brady, 430 U.S. 274 (1977), the United States Supreme Court rejected the view that the Commerce Clause prohibits states (and municipalities) from taxing interstate commerce. The Court held that a tax on interstate commerce will pass muster under the Commerce Clause if it meets the following four-part test:

a. The tax must be applied to an activity having a substantial nexus with the taxing authority;

b. The tax must be fairly apportioned;

c. The tax must not discriminate against interstate commerce; and

d. The tax must be fairly related to the services provided by the taxing authority. Complete Auto Transit, 430 U.S. at 287.

3. In Commerce Clause tax decisions since Complete Auto Transit, the multiple taxation issue has generally been discussed in the context of the "apportionment" or "discrimination" prongs of the Complete Auto Transit test. See, e.g., Goldberg v. Sweet, 488 U.S. 252, 261-265 (1989) (apportionment); Exxon Corp. v. Dep't of Revenue, 447 U.S., 207, 227-229 (1980) (discrimination).

4. It has not always been clear whether it is the mere hypothetical risk of multiple taxation, or the actuality of multiple taxation, that is offensive to the Commerce Clause. Many prior decisions suggested that it is the actuality of multiple taxation that is offensive. Exxon, 447 U.S. at 229 (stating, in rejecting risk of multiple taxation argument, that "it is the risk of multiple taxation that is being asserted; actual multiple taxation has not been shown" [emphasis in the original]); Moorman Mfg. Co. v. G.D. Bair, 437 U.S. 267, 280 (1980) (stating that it would be "an exercise in formalism" to declare a tax unconstitutional "based on speculative concerns with multiple taxation"); and Dep't of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 746 (1978) (recognizing that the mere threat of multiple burdens was an "abstraction" where no actual multiple burdens were demonstrated).

5. On the other hand, more recent decisions have also focused on hypothetical multiple tax burdens. This focus

is embodied in the "internal consistency doctrine." The doctrine has been applied in both the apportionment context, Goldberg, 488 U.S. at 260-261, and the discrimination context, Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984). Under the doctrine, the tax being examined must be structured so that, if every jurisdiction hypothetically imposed an identical tax, no multiple taxation would result. Goldberg, 488 U.S. at 261. The primary impact of the doctrine, as applied to sales and use taxes, appears to be the requirement of a credit against taxes previously paid in another jurisdiction. See Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 2814 (1987) (dissenting opinion of Scalia noting that, had doctrine been applied in earlier decisions, a credit requirement "would have followed as a matter of mathematical necessity.")

6. Colorado's sales and use tax structure incorporates at least three levels of government: state, county, and municipality. Crediting provisions exist at each of the levels, but they are lateral (state tax-to-state tax, county tax-to-county tax, and municipal tax-to-municipal tax). C.R.S. § 39-26-203(1)(k); C.R.S. § 29-2-109 (1) (f) (I) and (II); and D.R.M.C. § 53-92 (c).

7. United asserts that "since the State of Colorado is constitutionally required to allow a full credit against use tax for sales and use taxes paid in other states and municipalities, Denver is subject to the same requirement." United brief at 18.

8. Thus, United's analysis requires not only lateral credits between equivalent levels of government, but cross-credits in every other direction as well. The State of Colorado, in addition to the credit provided for in C.R.S. § 39-26-203 (l)(k), would be required to credit for county and municipal

taxes. Counties, in addition to the credit provided for in C.R.S. § 29-2-109(l)(f)(I), would be required to credit for state and municipal taxes. Statutory (non-home rule) municipalities, in addition to the credit provided for in C.R.S. § 29-2-109(1)(f)(II), would be required to credit for state and county taxes. Denver and other home rule municipalities providing a municipal credit in their own ordinances would likewise be required to credit for state and county taxes.

9. United's analysis, however, lacks support in the decisions cited by United. As pertinent here, the internal consistency test requires the hypothetical imposition, by every other state, of Colorado's sales and use tax structure. Thus, the hypothesis requires a structure identical to Colorado's. Goldberg, 488 U.S. at 261. Colorado's structure, while multi-leveled, provides lateral credits at each level. If every other state had an identical multi-leveled tax, with identical lateral credits, no multiple taxation could result.

10. Moreover, to the extent that there is any possible risk of multiple taxation, that possibility has been more than eliminated in this case. Denver has credited United for both state and local taxes paid by United to other jurisdictions. Thus, there is no actuality of multiple taxation.

11. Finally, D.R.M.C. §53-97(11) already exempts from the Denver use tax all sales which the Denver is prohibited from taxing under the Constitution of the United States. Thus, assuming arguendo that the cross-credits urged by United are mandated under the Commerce Clause, the D.R.M.C. is written in a fashion that accommodates such credits. No need exists to strike down the use tax provisions as invalid.

12. Given the foregoing, United has not established beyond a reasonable doubt that Denver's use tax provisions are facially invalid under the Commerce Clause.

H. Penalties.

1. United argued that penalties were improperly imposed and must be abated. However, the evidence does not establish that the penalties were improperly imposed or that abatement of the penalties is mandated.

2. Under D.R.M.C. §53-114(a), the imposition of penalties is automatic upon failure to pay the taxes imposed by the D.R.M.C.; no showing of negligence, intentional disregard, or lack of good faith is required. The assessment resulted from an audit which revealed that additional taxes were due Denver which were not paid during the assessment period. Therefore, penalties were properly imposed, and the Manager is not mandated by D.R.M.C. §53-133 to waive them.

I. Final decision and order.

1. Based on the foregoing findings of fact and conclusions of law, the following final decision and order are entered:

a. United does not have standing to challenge the facial validity of the D.R.M.C.'s use tax provisions.

b. United has not proven beyond a reasonable doubt that the D.R.M.C.'s use tax provisions facially violate the Commerce Clause.

c. The assessment, including tax, penalty, and interest, must be and hereby is affirmed in its entirety.

2. A true copy of this decision shall be sent to:

United Air Lines, Inc.
P. O. Box 66100 - WHQCT
Chicago, Illinois 60666-0100

3. This Decision and Order may be reviewed as provided in the D.R.M.C.

Entered this April 18, 1996 at Denver, Colorado.

MANAGER OF REVENUE
CITY AND COUNTY OF DENVER

By: _____
Tami A. Tanoue
Hearing Officer

APPENDIX A

BEFORE THE MANAGER OF REVENUE
CITY AND COUNTY OF DENVER
STATE OF COLORADO

In Re: United Airlines, Inc., Petitioner
Account No. 2518(5)
Case No. 951007

STIPULATION OF FACT

---

1. Petitioner, United Airlines, Inc., is an interstate and international airline carrier of passengers and cargo which conducted its air carrier operations from facilities throughout the world, including the City and County of Denver, Colorado ("Denver") during the audit period, from January 1, 1991 through June 30, 1994.

2. During the audit period, Petitioner conducted operations at Stapleton International Airport for commercial passenger flights between Stapleton and various states throughout the United States.

3. During the audit period, Petitioner shipped into Denver aircraft parts (including parts which can be used more than once after rehabilitation and repair) and engines which were utilized for replacement or repair installation upon its commercial aircraft. Petitioner does not dispute that these parts and engines were stored, used, consumed or distributed in Denver.

4. Denver has adopted an ordinance (Denver Municipal Code, Article III, §§ 53-91 through 53-138) (the "Ordinance") which imposes use tax upon the storage, use, distribution on

consumption of services and tangible personal property, including aircraft parts and engines, in Denver (the "Denver Use Tax"). The Ordinance adopted on December 14, 1981 pursuant to the Denver Charter, provides for tax credit to any taxpayer for retail sales tax or use tax paid to any municipal corporation of any state

5. Petitioner received an assessment from the Denver Manager of Revenue on October 6, 1995. The assessment was based upon an audit for the period January 1, 1991 through June 30, 1994. That assessment, as revised by the Manager, is based upon a calculation of Denver Use Tax allegedly owed by Petitioner for depreciated values of all aircraft parts and engines shipped into Denver during the audit period. The calculation includes a credit for sales or use tax paid to California state and local taxing jurisdictions to the extent the amount paid to the California jurisdictions for particular parts or engines was equal to or less than the amount of use tax allegedly due Denver for such parts or engines. Parts or engines that may have been shipped into Denver more than once during the audit period were taxed only once by Denver.

6. Petitioner does not dispute the adjusted amount of tax ($5,795,694.76) and interest ($2,370,784.19) which would be due and owing by Petitioner if the Denver Use Tax is ultimately determined (after exhausting all legal appeals) not to violate the Commerce Clause of the United States Constitution. The stipulated amounts were calculated based upon a sample and various assumptions which are not in dispute.

Respectfully submitted this 1st day of April, 1996.

BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.

By: _____
Hubert A. Farbes, Jr.
Michael J. Sternick
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 534-6335

-and-

SKADDEN ARPS SLATE MEAGHER
& FLOM

By: _____
Pamela F. Olson
1440 New York Avenue, N.W.
Washington, D.C. 20005
202-371-7000

ATTORNEYS FOR PETITIONER
UNITED AIRLINES, INC.

-and-

OFFICE OF THE DENVER CITY ATTORNEY

By: _____
Daniel E. Muse, Denver City Attorney
Maria Kayser, Assistant City Attorney
City and County Building, Room 353
Denver, Colorado 80202-5375
(303) 640-3611

ATTORNEYS FOR RESPONDENT CITY AND COUNTY OF DENVER

UNITED AIRLINES, INC.
CHICAGO, IL.
2518-5
AUDIT PERIOD: 1/1/91 - 6/30/94
AUDIT SUMMARY
(UALROTSH)

PREPARED BY: DWK/SLE
REVIEWED BY:

TYPE OF TAX	W/P REFERENCE	AMOUNT OF TAX	PENALTY (10%)	INTEREST RATE	INTEREST AMOUNT	TOTAL DUE	BASIS OF INTEREST CALCULATION (1% PER MONTH)
USE TAX:							
AIRCRAFT PARTS							
EXPENDABLE AIR-CRAFT PARTS	B 5-1	65,477.26	6,547.73*		20,960.51	92,985.50	SEE SCHEDULE(S) B 5-1 FOR INTEREST CALCULATION
ROTABLE PARTS (ACQUIRED WITH AIRCRAFT)	B 3-1	3,598,297.41	359,829.74*	42.00%	1,511,284.91	5,469,412.06	42 MONTHS FROM 1/1/91 TO 6/30/94, AVG. IS 21.0 PLUS 21 MONTHS TO 4/20/96
ROTABLE PARTS (ACQUIRED AS NEW SPARES)	B.4-1	398,433.11	39,843.31*		127,546.03	565,822.45	SEE SCHEDULE(S) B.4-1 FOR INTEREST CALCULATION
ENGINES	B 7-1	1,936,641.70	193,664.17*	42.00%	,813,389.51	2,943,695.38	42 MONTHS FROM 1/1/91 TO 6/30/94, AVG. IS 21.0 PLUS 21 MONTHS TO 4/20/96
CREDIT FOR USE TAX PAID ON AIR-CRAFT PARTS	B.10	(203,154.72)	(20,315.47)*		(102,396.77)	(325,866.96)	SEE SCHEDULE (S) B.10 FOR INTEREST CALCULATION
TOTAL DUE		5,795,694.76	579,569.48		2,370,784.19	8,746,048.43	

* PENALTIES DUE ARE 10% OR $10, WHICHEVER IS GREATER.

PROOF 0.00

17f

CHARTER AND CODE OF ORDINANCES, DENVER, COLORADO
TITLE II REVISED MUNICIPAL CODE
CHAPTER 53 TAXATION AND MISCELLANEOUS REVENUE

ARTICLE II. SALES TAX
DIVISION 1. GENERALLY

Sec. 53-25. Imposition of tax.

There is levied and there shall be collected and paid a tax in the amount stated in this article, as follows:

(1) On the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.

(2) In the case of retail sales involving the exchange of property, on the purchase price paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, excluding however, from the consideration or purchase price the fair market value of the exchanged property if such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(3) Upon the purchase price or charge for telephone and telecommunications services, including in addition to audio and video transmission and reception, other two-way electronic or electromagnetic wave transmissions, receptions or

communications of any sort, by or through any medium, whether such services are furnished by public or private corporations or associations, that both originate in and are charged to a telephone number or an account located within the city, excepting, however, monthly or other periodic usage charges that represent varying amounts billed to accounts for a subscriber's actual use of interstate services provided by a long-distance telecommunications company and charged to the subscriber by or on behalf of a long-distance telecommunications company.

(4) Upon the purchase price or charge for coal, petroleum, liquid petroleum, electric, steam and natural gas services, and any other products used for energy-producing purposes, whether furnished by municipal, public or private corporations or associations, furnished and sold for domestic, commercial or industrial consumption and not for resale.

(5) Upon the amount paid for food or drink served or furnished in or by restaurants, cafes, lunch counters, cafeterias, hotels, drugstores, social clubs, nightclubs, cabarets, resorts, snack bars, caterers, boardinghouses, carryout shops and other places at which prepared food or drink is regularly sold, including sales from pushcarts, motor vehicles and other mobile facilities. Cover charges, admission or entrance fees, and mandatory service or service-related charges, whether described as tips, gratuities or other-

wise, shall be included as part of the amount paid for such food or drink.

(6) Upon the purchase price or charge for the furnishing or sale to customers within the city of informational or entertainment service wherein the relay or transmission of electromagnetic waves through any medium, tangible or intangible, including cable, glass fiber and ambient air, is necessary for the service to be received, including, but not limited to, pay television, excepting however, telephone and telecommunications services described in section 53-25(3) and television, cinema or similar programming provided at a theater or similar place open to the public.

(7) Upon the purchase price or charge for data processing equipment and data processing programs.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, §§ 7, 8, 12-3-84; Ord. No. 679-87, § 3, 11-23-87; Ord. No. 922-91, §§ 2--4, 12-9-91)

ARTICLE III: USE TAX
DIVISION 1. GENERALLY

Sec. 53-92. Legislative intent.

(a) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that, for the purposes of this article, every person who stores, uses, distributes or consumes in the city any article of tangible personal property or any service subject to the provisions of this article, purchased at retail, is exercising a taxable privilege.

(b) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that, for the purposes of this article, every vendor who is engaged in business in the city and who shall deliver or cause to be delivered to the purchaser in the city any property or service taxable herein shall collect the tax imposed by this article upon the basis of an addition of the tax imposed by this article to the purchase price of such property or service that is purchased at any one (1) time by every such purchaser in the manner hereinafter set forth.

(c) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provisions of this article shall apply to any person who has already paid a retail sales tax or a use tax in respect to the sale of a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who

thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city, but the tax imposed by this article shall, in such event, be measured by the difference between the amount imposed by this article and the amount previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege of using, storing, distributing or consuming such service or personal property in the city.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 680-87, § 1, 11-23-87)

Sec. 53-96. Imposition of tax.

There is levied and there shall be collected and paid a tax in the amount stated in this article, by every person exercising the taxable privilege of storing, using, distributing or consuming in the city a service subject to the provisions of this article or any article of tangible personal property, purchased at retail, for said exercise of said privilege, as follows:

(1) On the purchase price paid or charged upon all sales and purchases of tangible personal property.

(2) In the case of retail sales involving the exchange of property, on the purchase price paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, excluding, however, from the consideration or purchase price the fair market

value of the exchanged property if such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(3) Upon the purchase price or charge for telephone and telecommunications services including, in addition to audio and video transmission and reception, other two-way electronic or electromagnetic wave transmissions, receptions or communications of any sort, by or through any medium, whether such services are furnished by public or private corporations or associations, that both originate in and are charged to a telephone number or an account located within the city, excepting, however, monthly or other periodic usage charges that represent varying amounts billed to accounts for a subscriber's actual use of interstate service provided by a long-distance telecommunications company and charged to a subscriber by or on behalf of a long-distance telecommunications company.

(4) Upon the purchase price or charge for coal, petroleum, liquid petroleum, electric, steam and natural gas services, and any other products used for energy-producing purposes, whether furnished by municipal, public or private corporations or associations, furnished and sold for domestic, commercial or industrial consumption and not for resale.

(5) Upon the purchase price or charge for the furnishing or sale to customers within the city

of informational or entertainment service wherein the relay or transmission of electromagnetic waves through any medium, tangible or intangible, including cable, glass fiber and ambient air, is necessary for the service to be received, including, but not limited to, pay television, excepting, however, telephone and telecommunications services described in section 53-96(3) and television, cinema or similar programming provided at a theater or similar place open to the public.

(6) Upon the purchase price or charge for data processing equipment and data processing programs.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, §§ 7, 8, 12-3-84; Ord. No. 680-87, § 4, 11-23-87; Ord. No. 923-91, §§ 2–5, 12-9-91)

Sec. 53-97. Exemptions.

There shall be exempt from taxation under the provisions of this article the following:

(1) All sales to the United States government, to the state, its departments and institutions, and the political subdivisions thereof only when purchased in their governmental capacities.

(2) All sales made to religious or charitable corporations when purchased for their regular religious or charitable functions and activities.

(3) All sales of cigarettes.

(4) All sales of motor fuel and special fuel as defined in this article.

(5) All sales and purchases of neat cattle, sheep, lambs, swine and goats; all sales of mares and stallions for breeding purposes.

(6) All sales and purchases of feed for livestock or poultry and all sales of seeds to farmers, ranchers, truck farmers, florists and horticulturists who sell the crops resulting from the propagation of such seeds or use such crops as feed for livestock or poultry.

(7) The sale and purchase of medical supplies.

(8) The sale and purchase of food.

(9) Sales of tangible personal property purchased outside the city for use, storage, distribution or consumption outside the city by a nonresident of the city while the property is temporarily within the city for the purchaser's own personal use, storage or consumption.

(10) Sales of tangible personal property to a natural gas and electric utility or a telephone utility that is not used, consumed or distributed in the city but is for use, consumption or distribution in its business operations outside the city even though

the property is delivered and temporarily stored within the city.

(11) All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state.

(12) Sales of automotive vehicles as defined in this article that are registered and required by state law to be registered outside the city.

(13) All sales of farm machinery as defined in this article.

(14) Sales of tangible personal property and services taxable under the city retail sales tax article, article II of this chapter, upon which a sales tax has been paid to the city.

(15) The sale of construction and building materials for their storage in the city; but any use, consumption or distribution beyond storage of the construction and building materials in the city shall be taxable.

(16) Sales of machinery, tools and equipment, including replacement parts, to a transportation utility to be used by the utility in the operation of an equipment maintenance facility and at an industrial building:

a. That is located in the city within an enterprise zone designated as such pursuant to state law;

b. That contains at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

c. That serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

d. That is operated by an interstate carrier for hire primarily for maintaining, rebuilding or repairing equipment moving in interstate commerce.

This exemption may be applicable to the first and second years of operations at the industrial building provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(17) Sales of construction and building materials for use in the construction, reconstruction or remodeling of a new industrial building of a transportation utility to be used by the utility for an equipment maintenance facility:

a. That is located in the city within an enterprise zone designated as such pursuant to state law;

b. That is designed to contain at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

c. That serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

d. That is operated by an interstate carrier for hire primarily for maintaining, rebuilding or repairing equipment moving in interstate commerce.

This exemption may be applicable to the design and construction phases of the new facility and to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(18) All sales of prepress preparation materials as defined in this article.

(19) Sales of tangible personal property (excepting (a) construction equipment, tools and machin-

ery; (b) construction and building materials as defined in this article; and (c) vehicles that are capable of moving themselves, or of being moved from place to place upon wheels or endless tracks, excluding bicycles and other devices moved by human power and excluding "farm machinery" as defined in this article) that are first used, stored, consumed or distributed within the city more than one (1) year after the most recent sale of the property if, within the year following such sale, the property has been used in a significant way outside the City and County of Denver for the principal purpose for which it was most recently purchased.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 15, 12-3-84; Ord. No. 680- 87, § 5, 11-23-87; Ord. No. 568-91, §§ 2, 3, 8-5-91; Ord. No. 571-91, § 1, 8-5- 91; Ord. No. 923-91, §§ 6–9, 12-9-91; Ord. No. 551-92, § 3, 8-10-92; Ord. No. 595-93, § 1, 8-2-93)

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

No. 99-1698

In The

Supreme Court of the United States

UNITED AIR LINES, INC., a Delaware corporation and AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule City and a Colorado municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

MARIA KAYSER
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CITY AND COUNTY OF DENVER
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June 2, 2000

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STATUTORY PROVISIONS

In addition to the D.R.M.C. provisions cited by Petitioner, the Respondent also refers to § 53-95(21), which states in pertinent part,

> *Sale* or *purchase* or *sale and purchase* includes installment and credit purchases and sales and the exchange of property or services that are taxable under the terms of this article as well as the purchase and sale thereof for money; and every transaction conditional or otherwise, based upon consideration constitutes a sale . . .

STATEMENT OF THE CASE

This case concerns the interpretation of Denver's use tax ordinances. United Air Lines and Air Wisconsin ("the Airlines") are interstate air carriers who were audited by the City and County of Denver in 1995. Both airlines were assessed Denver use tax on rotable aircraft parts. Rotable parts are those that may be repaired and reused. These parts may be shipped to different locations to be repaired and re-installed on airplanes as necessary.

The Denver use tax is levied on the " . . . taxable privilege of storing, using, distributing or consuming in the city . . . any article of tangible personal property, purchased at retail . . . " § 53-96, Denver Revised Municipal Code ("D.R.M.C." or "code"). The D.R.M.C. provides a credit for municipal sales and use taxes previously paid on such property as follows:

> It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provisions of this article shall apply to any person who has already paid a retail sales tax or use tax in respect to the sale of a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city; but the tax imposed by this article shall, in any event, be measured by the difference between the amount imposed by this article and the amount previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege of using, storing, distributing or consuming such service or personal property in the city.

§ 53-92(c), D.R.M.C., Denver assessed use tax on parts stored by Air Wisconsin in Denver, which were shipped to Denver from Wisconsin. No prior sales or use tax was assessed on those parts by any other jurisdiction. Air Wisconsin agreed the parts were used in Denver and also agreed to the amount of this assessment if it is upheld.

Denver assessed use tax against United for parts stored and used in Denver by United. United agreed the parts were used in Denver and agreed the amounts assessed were correct if the assessment is upheld. A certain number of parts had been stored in California

before coming to Denver. United had paid sales and/or use taxes to various jurisdictions in California on those parts. Denver credited United with the sales and use tax payments made to all taxing jurisdictions in California, including nonmunicipal jurisdictions. This was done prior to the administrative hearing. No other tax credits were claimed by United in this audit. *See Stipulation of Fact* at pp. 13f-15f in the Appendix to the Airlines' Petition for Writ of Certiorari ("Airlines' Appendix"). Thus, no multiple taxation occurred in this case. The Airlines nevertheless protested the assessments to the administrative hearing officer, claiming that § 53-92(c), D.R.M.C., fails to expressly provide credit for nonmunicipal taxes previously paid. Thus, even though United was given such credit, the Airlines claimed this omission in the ordinance rendered the entire use tax article facially unconstitutional under the internal consistency prong of the dormant Commerce Clause.

PROCEEDINGS BELOW

Each airline's case was heard separately. In the United case, the hearing officer found that because United had received the relief it requested in the form of sales and use tax credits, United lacked standing to raise a constitutional challenge to the use tax ordinances.

In addressing the merits of United's internal consistency argument, she found that the Commerce Clause cases cited by United did not require "cross-credits" between every level of government. She concluded that as long as the state of Colorado provided a state tax

credit, and local governments provided local credit, the internal consistency test was satisfied by § 53-92(c), D.R.M.C.

She went on to find that even if the Constitution requires Denver to provide nonmunicipal credits, such a requirement automatically applies to the use tax by virtue of § 53-97(11), D.R.M.C., which is contained in the use tax article. That section exempts from taxation "[A]ll sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state." In other words, § 53-97(11) prohibits Denver from levying tax where the Constitution requires a credit or exemption.

In the Air Wisconsin proceeding, Air Wisconsin did not claim any credits for previously paid taxes and the standing issue was not raised. On the merits, the hearing officer made the same ruling she made in the United case.

Both airlines appealed to the Denver District Court (the trial court) and the cases were consolidated. The court took a different approach from the hearing officer, finding that the internal consistency test does require a system of "cross-credits", and that Denver does have to give credit for nonmunicipal taxes previously paid. The court also found that United had standing, even though United had already received the relief it requested.

The District Court affirmed the hearing officer's conclusion that § 53-97(11), D.R.M.C., preserves the constitutionality of the use tax ordinance. The court states that while § 53-97(11) does not directly provide credit for taxes previously paid, by " . . . construing that provision in the context of the use tax article as a whole, § 53-97(11)

permits that result." The court also finds that the term "sale" in § 53-97(11) includes any "sale and purchase" which triggers the application of use tax. § 53-95(21), § 53-96(1), D.R.M.C.

Denver did not appeal any portion of the decision. Thus, contrary to United's claims that Denver has acted inconsistently, Denver chose to abide by the decision and its requirement that Denver provide all state and local tax credits. Denver would not have given the credits in the first place had Denver not concluded there was a legal basis for doing so. The Airlines appealed to the Colorado Court of Appeals, again claiming that the use tax is unconstitutional, even though the Airlines won the case in District Court.

Denver did not contest the issue of providing credits in the Court of Appeals. However, because United raised the issue of lateral credits in its opening brief, Denver addressed the issue in Denver's answer brief. Denver argued that lateral credits were probably sufficient, but if not, the use tax was still constitutional under § 53-97(11), D.R.M.C., because it provided for other taxes to be credited as well.

The Court of Appeals upheld the decision of the District Court. It should be noted that the Court of Appeals found that the District Court *did not* rule that the use tax was unconstitutional on its face. Therefore, the Court of Appeals addressed only the constitutionality of the use tax as applied. *See* p. 8d in Airlines' Appendix.

The Airlines again appealed, to the Colorado Supreme Court, even though they won in the Court of Appeals. The Colorado Supreme Court initially granted

the Airlines' Petition for Writ of Certiorari. After the submission of briefs and oral argument, the Court dismissed the writ as having been improvidently granted. The same day, the Court issued a decision in *General Motors v. City and County of Denver,* 990 P.2d 59 (Colo. 2000). The *General Motors* case also concerned the credit issue, but was factually different from the Airlines' cases. Pursuant to a motion by the Airlines, the Court withdrew its earlier order denying certiorari, reinstated the petition, and affirmed the Court of Appeals decision. The Court also stated, without further elaboration, that its decision in the *General Motors* case addressed the issues in the Airlines' case. *See* pp. 1a-3a, in the Airlines' Appendix. Thus, there is no decision on the merits from the Colorado Supreme Court in the present case. The Airlines are essentially trying to appeal the *General Motors* decision in this case. General Motors did not appeal their case to this Court.

The Airlines now seek certiorari in this Court, not on the Commerce Clause issue, but on the due process notion of vagueness. Vagueness was never raised or argued in any of the lower courts. The only reference to this issue is by the Colorado Supreme Court in *General Motors* in a footnote, where the Court suggests *in dicta* that the D.R.M.C. might not alert taxpayers to the various credits allowed. The Court acknowledges that General Motors did not complain of insufficient notice, and the Court concludes that "the notice issue may never arise." *See General Motors* opinion at page 19c in the Airlines' Appendix.

REASONS FOR DENYING THE PETITION

1. The Airlines did not comply with Rule 14(1)(g)(i) of the Rules of the United States Supreme Court.

According to Rule 14(1)(g)(i), on review of a state court judgment, the Petitioner must show where the federal question sought to be reviewed was raised in the lower courts, and that such issue was properly and timely raised. As stated above, the issue of vagueness under the Due Process Clause was never raised by the Airlines nor ruled upon in the lower courts. There is no record upon which to make a ruling on this issue. Therefore this issue is not properly or timely raised.

Moreover, the Airlines were not prejudiced by any alleged "lack of notice" or vagueness in the ordinance. To the contrary, United requested credits and was given the credits before its case ever went to a hearing. United had not paid the assessment before the credits were figured so United did not overpay any taxes for which credit was due. Air Wisconsin was not entitled to any credits so it cannot now complain of lack of notice.

2. This case concerns the interpretation of a local ordinance and does not present an important federal question.

As Denver did not appeal the decision of the District Court which requires Denver to provide credit for all state and local sales and use taxes paid on property which becomes taxable in Denver, the Commerce Clause

issue is no longer in dispute. The District Court concluded that Denver must provide such credits under the Constitution and Denver did not appeal that ruling.

The Airlines continued to argue that the lack of specific credit language for nonmunicipal taxes in § 53-92(c), D.R.M.C., made the use tax altogether unconstitutional, regardless of § 53-97(11), D.R.M.C. Thus, the only issue before the Colorado Court of Appeals and the Colorado Supreme Court was whether § 53-97(11), D.R.M.C., serves to require such credits given the lack of specific language in § 53-92(c). This case is therefore strictly a matter of interpreting a local ordinance, which this Court has left to the judgment of the state courts. *United Air Lines v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973).

There is no federal question properly before this Court because the constitutional issue has already been decided and not appealed by Denver. Thus, under Rule 10 of the rules of this Court, the Airlines have shown no compelling reason why the Court should grant discretionary review.

3. Denver's use tax is not unconstitutionally vague

The vagueness component of the Due Process Clause may invalidate a statute if the statute does not inform a person of ordinary intelligence what conduct the law requires or forbids, or if the statute speaks with such uncertainty that it permits arbitrary enforcement. *Missourians for Tax Justice Ed. Project v. Holden*, 959 S.W.2d 100 (Mo. 1997). The Airlines have failed to show that the ordinances in question violate Due Process.

To begin with, at page 10 of their Petition, the Airlines admit that "the use tax scheme is clear in its scope and operation". On page 15, they state that there is no ambiguity or vagueness on the face of §§ 53-92(c) and 53-97(11), D.R.M.C. The Airlines then allege that it is the Colorado Supreme Court's "rewriting" (p. 13) of the code in *General Motors* that makes the code vague. The terms of the ordinances cannot be clear and vague at the same time.

Furthermore, the Court in *General Motors* did not rewrite anything. The Court simply said that the Constitution requires the credits which United received, and the code is not unconstitutional for failing to spell that out in § 53-92(c), D.R.M.C. The Court found that § 53-97(11), D.R.M.C., requires the credits to be given, and therefore, the code is constitutional. The Court states at page 20(c) of the Airlines Appendix,

> Our interpretation of D.R.M.C. § 53-97(11) saves Denver's use tax from constitutional infirmity. However, Denver must provide GM with a credit for the sales and use taxes paid to other states and their subdivisions such that GM will pay no more tax on the automobiles than it would have paid by purchasing the component parts in the City and County of Denver, State of Colorado.

This ruling is perfectly clear. By its terms, the decision states that § 53-97(11), D.R.M.C., provides notice of the credit. The terms of the ordinances were not changed. The Airlines fail to indicate what language in the ruling is vague. Moreover, this Court has upheld the constitutionality of a statutory scheme where the state court has

concluded that one statutory provision is to be read into another. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

The Airlines have placed great weight on the "legislative intent" of § 53-92(c), D.R.M.C., to only provide municipal tax credits. The Airlines do not explain why similar weight should not be accorded to § 53-97(11), D.R.M.C., which expresses a clear intent that the code not violate any provision of the Constitution.

The Colorado Supreme Court also disregards the Airlines' contention that credits are different from exemptions as the term "exemption" is used in the heading of § 53-97, D.R.M.C. At page 19c of the Airlines' Appendix, the Court in *General Motors* states "we interpret 'exemption' only to reduce the tax owed Denver by the amount of sales and use tax paid to other state and sub-state taxing jurisdictions."

Contrary to the Airlines' contention that the code fails to adequately notify taxpayers, what the Airlines seem to be worried about is the interpretation of the code by the City. As with any judicial mandate that affects the interpretation of a local ordinance, the City is bound by the decisions in both the *United* case and the *General Motors* case. These decisions overrule any contrary position previously taken by the City. The suggestion that Denver would blatantly disregard a rule of law in this context is ludicrous.

Whether a taxpayer avails itself of a credit is the taxpayer's responsibility. The taxpayer must be aware of the laws in a taxing jurisdiction and apply for any appropriate credits. This is true in any taxing context. And as

the Airlines themselves point out at pages 3-4 of the Petition, the taxpayer files a use tax return which provides a section for taking credits and exemptions.

Nor is there a need in this instance for "minimum guidelines" in order to apply the credits. Either the taxpayer applies for the credit or it does not. If asked for and substantiated, the credit must be given. There is no discretion on the part of City auditors, nor are the code provisions so unclear as to afford latitude for subjective application. *Big Mama Rag, Inc., v. United States,* 631 F.2d 1030, 1034 (D.C. Cir. 1980). United does not complain of the manner in which the credit was computed. United agreed to the stipulated assessment after the credits were applied. In addition, due to the automatic nature of the credit, the Airlines have not shown that there is a danger of arbitrary enforcement. The credit mechanism worked precisely as it should have in this case and the Airlines have presented no evidence of the due process dangers they allege.

Many of the Due Process cases cited by the Airlines concern situations where a statute's failure to inform an individual of prohibited conduct resulted in the imposition of a penalty. *See, e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). This Court in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), requires that such "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Here, there is no conduct to be prohibited. And there is no penalty for failing to apply for a credit.

This Court will, if possible, construe a statute so as to render it constitutional. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954). The highest court in Colorado has done so in this case. The Airlines have failed to demostrate any Due Process violation, or any other grounds for granting discretionary review in this matter.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 2, 2000

Supreme Court, U.S.
FILED
JUN 12 2000
CLERK

(3)

No. 99-1698

IN THE

Supreme Court of the United States

UNITED AIR LINES, INC., a Delaware corporation, and AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule City and a Colorado municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

REPLY BRIEF FOR PETITIONERS

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15pp

RULE 29.1 LISTING

Petitioner United Air Lines, Inc., is a subsidiary of UAL Corporation, a publicly owned corporation. Petitioner Air Wisconsin, Inc., is a wholly-owned subsidiary of Air Wis Services, Inc., a wholly-owned subsidiary of UAL Corporation. United Air Lines, Inc., owns, either directly or indirectly, a 10% or more interest in the following entities: AirLiance Materials, LLC; Atlanta Airlines Terminal Corporation; CIMO, Inc.; DUNC, LLC; Galileo International, Inc.; GetThere.com; Reno Fueling Facilities Corp.; and Skytech Solutions, LLC.

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I. The Due Process/Vagueness Issue Was Properly Raised Below And Merits This Court's Consideration.

In Respondent's Brief in Opposition ("Opposition"), Denver argues that the issue of vagueness was not properly or timely raised, because it was neither raised by the Airlines below nor ruled upon in the lower courts. Opposition at 6-7.

To the contrary, as explained in greater detail in the Airlines' Petition for Writ of Certiorari ("Petition"), the Airlines repeatedly addressed the use tax law's failure to provide the clear guidelines particularly needed in a self-assessment system of taxation and explained that Denver's vacillating and conflicting views on whether the full credit was required creates a serious concern that the Commerce Clause[1/] violation will recur and has resulted in confusion to taxpayers. *See* Petition at 5-7. The Airlines further argued that interpreting D.R.M.C. § 53-97(11) to provide the full credit would do violence to the statutory language and the legislative intent of the Denver City Council. *See id.* at 6-7. Thus, the Airlines properly raised the vagueness issue in the proceedings below.

In addition, the Supreme Court of Colorado itself addressed the vagueness issue in its opinion in *General Motors Corporation v. City and County of Denver*, 990 P.2d 59, 70, n.11 (Colo. 1999) (App. 19c).[2/] Consequently, the

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1/ U.S. CONST. art. I, § 8.

2/ Denver's assertion that "there is no decision on the merits from the Colorado Supreme Court in the present case"

(continued...)

vagueness issue is properly before this Court. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991).

Denver's belated attempt in the Opposition to gloss over its past vacillation only highlights the necessity for a clear mandate from this Court. Denver asserts that "Denver would not have given the credits [to the Airlines] in the first place had Denver not concluded there was a legal basis for doing so." Opposition at 5. This assertion, however, is flatly contradicted by Denver's insistence that it was not required to give the full credit – a claim it made both before the Court of Appeals of Colorado in the Airlines' case and before the Colorado Supreme Court in *General Motors*, which was pending before the Colorado Supreme Court at the same time as this case.[3/] *See* Petition at 7-8. Apparently Denver

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[2/] (...continued)
(Opposition at 6) is absurd in light of the Colorado Supreme Court's opinion in the Airlines' case that it viewed its decision in *General Motors* "as fully and completely addressing the issue on which we granted certiorari in this case." Colorado Supreme Court Opinion, at 2 (Jan. 24, 2000) (App. 2a).

[3/] Denver further asserts that it "chose to abide by the [Denver District Court's] decision and its requirement that Denver provide all state and local tax credits." Opposition at 5. However, Denver's failure to appeal the District Court's decision on the Commerce Clause issue did not signify its agreement with the decision, inasmuch as it continued to dispute this issue before the court of appeals. *See* Petition at 6. Denver itself admits that it "argued that lateral credits

(continued...)

believed that there was both a legal basis for granting the full credit and a legal basis for not granting the full credit. Thus, the lack of a statutory provision clearly requiring the full credit allows Denver an opportunity once again to deny the credit which the Colorado Supreme Court has required it to grant and leaves taxpayers without knowledge of its availability.

Denver's argument that the Airlines were not prejudiced by any lack of notice or vagueness in the use tax statute is a mere variation on the standing argument it made in the district court and court of appeals. In those courts, Denver argued that the Airlines had no standing to challenge the constitutionality of the use tax because Denver had decided to grant the full credit in this case. Denver's Answer Brief to the District Court, at 15-17; Denver's Answer Brief to the Court of Appeals, 15. The Airlines explained that they had standing because of the possibility that the constitutional violation will recur in the future. Airlines' Opening Brief to the District Court, at 34-37; Airlines' Reply Brief to the District Court, at 11-12; Airlines' Opening Brief to the Court of Appeals, at 8-10; *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). Both the district court and the court of appeals concluded that the Airlines did have standing to challenge the constitutionality of Denver's use tax. District Court Opinion, at 3 (Dec. 12, 1996) (App. 5e); *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647, 651-52 (Colo. Ct. App. 1998), *aff'd* 992 P.2d 41 (Colo. 2000) (App. 4d-8d). The possibility of a future constitutional violation is particularly acute here given

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[3] (...continued)
were probably sufficient" before the court of appeals. Opposition at 5.

Denver's vacillating and conflicting positions regarding the requirement of a full credit. The fact that Denver could, and did, assert flatly contradictory positions at the same time in the Colorado Supreme Court illustrates that there can be no certainty how Denver will administer this statute.

II. Denver's Opposition Fails To Rebut The Necessity For Clear Notice In The Area Of State And Local Tax Laws Affecting Taxpayers Engaged In Interstate Commerce.

Denver's Opposition illustrates its fundamental lack of understanding as to the constitutional defect of its use tax law. First, Denver asserts that there is no federal question properly before this Court because the Colorado Supreme Court effectively ruled in favor of the Airlines on the Commerce Clause issue, and because the Colorado Supreme Court's ruling itself is not vague. Opposition at 7-9. However, in attempting to cure the Commerce Clause defect of the Denver use tax without invalidating the use tax, the Colorado Supreme Court substituted a vagueness defect for the Commerce Clause defect, and this vagueness defect is the heart of the Airlines' Petition. Likewise, Denver's assertion that the "terms of the ordinances cannot be clear and vague at the same time" (*id.* at 9) is nothing more than a confusion that Denver has inflicted on itself. Given Denver's adeptness at interpreting the same statute in two contradictory ways, it seems as though a statute can, in fact, be both clear and vague if placed in the hands of the wrong administrator. In this case, the statutory language of D.R.M.C. § 53-92(c) and § 53-97(11) is clear, and violates the Commerce Clause. The Colorado Supreme Court's "interpretation" of these provisions cures the Commerce Clause defect, but creates vague-

ness in violation of the Due Process Clause[4/]. It is that violation which requires this Court's consideration.

Second, Denver suggests that the failure of the use tax statute to give notice of the full credit to taxpayers does not concern Denver because "[w]hether a taxpayer avails itself of a credit is the taxpayer's responsibility" and the "taxpayer must be aware of the laws in a taxing jurisdiction and apply for any appropriate credits." Opposition at 10. However, the Due Process Clause requires that the law be clear and certain to persons of "ordinary intelligence," not just to constitutional scholars. *See, e.g., Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This is especially important for taxing statutes, which affect a wide range of people. A taxpayer should not have to be a constitutional scholar or regularly read court opinions to know to what credit he is entitled. Denver's nonchalance is particularly troubling in light of the limited scope of its refund statute. Under D.R.M.C. § 53-111(b) (Reply App. 1a), a taxpayer has only 60 days to file a claim for refund after the purchase of taxable goods or performance of taxable services. Unless taxpayers are already aware of the availability of the full credit when they initially pay the use tax, it is unlikely that they will ever have a meaningful opportunity to learn about it and timely claim a refund based on the full credit. Given Denver's past behavior, one can take little comfort in Denver's claim that "[t]he suggestion that Denver would blatantly disregard a rule of law . . . is ludicrous," or in its assertion that minimum guidelines for administration are unnecessary (Opposition at 10-11). It must be noted that, even after the district court and the court of appeals decided that the full credit is a constitu-

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[4/] U.S. CONST. amend. XIV, § 1.

tional requirement, Denver continued to deny such credits in *General Motors*.

Third, Denver suggests that the Due Process Clause requirement applies only where "a statute's failure to inform an individual of prohibited conduct resulted in the imposition of a penalty." Opposition at 11. Noting that "there is no penalty for failing to apply for a credit" and "there is no conduct to be prohibited," Denver suggests that the Due Process Clause requirement does not apply. *Id.* Denver's extremely limited view of what the Due Process Clause requires cannot be reconciled with this Court's jurisprudence. Taxation involves the exaction of the taxpayer's property, and exacting more than what is provided in the law is an unjust deprivation of property. Thus, Denver's failure to give notice of the full credit requirement to taxpayers deprives them of a fundamental right, just as a failure to give notice of a prohibited conduct. While the Due Process Clause consideration would be of paramount importance in the criminal law area, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Since participation in interstate commerce is a constitutionally protected right, *Dennis v. Higgins*, 498 U.S. 439, 448 (1991), Denver's use tax regime, which unduly burdens this right, should receive close scrutiny by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

CHARTER AND CODE OF ORDINANCES, DENVER, COLORADO
TITLE II REVISED MUNICIPAL CODE
CHAPTER 53 TAXATION AND MISCELLANEOUS REVENUE

ARTICLE II. SALES TAX
DIVISION 1. GENERALLY

Sec. 53-111. Refund procedures.

(a) Generally. A refund shall be made or credit allowed for the tax so paid under dispute by any purchaser who has an exemption as provided in this article. Interest shall be paid on refunds, but not credits, for overpayments made after October 1, 1993. Interest shall accrue from the time the overpayment is made. The rate of interest shall be fixed and shall be the average monthly rate earned by the city on the general fund for the calendar year immediately preceding the year in which the refund is made. Such refund shall be made by the manager upon entitlement thereto shown by the applicant and only after compliance with the following conditions.

(b) Application. Applications for refund must be made within sixty (60) days after the purchase of the goods or the performance of the services on which the exemption is claimed. The application must be supported by the affidavit of the purchaser accompanied by the original paid invoice or sales receipt and be made upon such forms and contain such information as shall be prescribed by the manager.

(c) Decisions. Upon receipt of such affidavit, invoice or receipt, and application, the manager shall examine the same with all convenient speed and shall give notice to the

applicant by an order in writing of his decision thereon.

(d) Hearing. An aggrieved applicant may, within twenty (20) days after such decision is mailed postpaid by certified mail to him, petition the manager of revenue for a hearing on the claim in the manner provided hereinafter regarding assessments and estimates of unpaid taxes.

(e) Refunds not assignable. The right of any person to a refund under this article shall not be assignable, and application for refund must be made by the same person who purchased the goods or services and paid the tax thereon as shown in the invoice for the sale thereof.

(f) Penalty for violating refund provisions. Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article.

(g) Violations of refund provisions to be used as evidence of fraudulent intent. If any person be convicted under the provisions of this section, the proof of such conviction shall be prima facie evidence of fraud by that person in any appropriate action brought or taken for recovery of other refunds made by the manager to such person within the prior three (3) years to the conviction. A brief summary of the penalties available under this article for violations of it shall be printed on each form issued by the manager for application for refund.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 680-87, § 8, 11-23-87; Ord. No. 662- 93, § 2, 8-30-93)